(1)

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No. 03 526

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,
PETITIONER,

-vs-

WARREN WESLEY SUMMERLIN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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157 pp

CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584, 589 (2002), this Court held that the Sixth Amendment jury trial guarantee extends to the determination of any fact, other than a prior conviction, that increases the maximum punishment for first-degree murder from life imprisonment to death. In the instant case, the United States Court of Appeals for the Ninth Circuit held that the rule announced in *Ring* should be applied retroactively to cases on collateral review.

1. Did the Ninth Circuit err by holding that the new rule announced in *Ring* is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality)?

2. Did the Ninth Circuit err by holding that the new rule announced in *Ring* applies retroactively to cases on collateral review under *Teague*'s exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings?

3. Did the Ninth Circuit err by applying *Ring* notwithstanding a "prior conviction" aggravating circumstance that, under *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998), need not be found by the jury?

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment denying federal habeas relief on Summerlin's state death sentence, finding that this Court's decision in *Ring* applied retroactively to cases on collateral review. *Summerlin v. Stewart*,[1] No. 98-9902, slip op. (9th Cir. Sept. 2, 2003) (en banc) (Appendix A).

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decision on Sept. 2, 2003. Petitioner has timely filed its petition for Writ of Certiorari within 90 days of that decision. The jurisdiction of this Court is invoked under the United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and United States Supreme Court Rule 10.

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1. Pursuant to Federal Rules of Appellate Procedure 43(c), Petitioner requests that Dora Schriro, the recently appointed Director of the Arizona Department of Corrections, be substituted as successor in office for Terry Stewart.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

In June 1982, a jury convicted Summerlin for the 1981 sexual assault and murder of Brenna Bailey. The trial judge found two aggravating circumstances, either of which rendered Summerlin eligible for a death sentence under Arizona's capital sentencing statute then in effect: (1) Summerlin had a prior felony conviction involving the use or threat of violence against another person; and (2) Summerlin committed the murder under especially cruel, heinous or depraved circumstances—the victim suffered mental terror during the sexual assault and murder, and Summerlin crushed her skull from all sides after raping her. The court imposed the death penalty after it found no mitigating circumstances sufficient to call for leniency.

The Arizona Supreme Court affirmed Summerlin's convictions and sentences. *State v. Summerlin*, 675 P.2d 686 (Ariz. 1983). In his direct appeal, Summerlin argued that Arizona's death penalty statute violated the Sixth Amendment jury trial guarantee because it required a trial judge to determine the circumstances necessary to impose the death penalty. Relying on *Proffitt v. Florida*, 428 U.S. 242 (1976), the Arizona Supreme Court rejected that argument. *Summerlin*, 675 P.2d at 695. Summerlin's direct appeal became final on April 17, 1984, when time elapsed for seeking review by this Court.

Following state post-conviction collateral proceedings, in April 1986, prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Summerlin filed a preliminary petition for federal habeas relief. Relying on *Walton v. Arizona*, 497 U.S. 639 (1990), the district court denied Summerlin's Sixth Amendment sentencing claim, along with his other claims. In March 1998, Summerlin appealed the district court's judgment, arguing among other claims that *Jones v. United States*, 526 U.S. 227 (1999), implicitly overruled *Walton*. The State of Arizona argued that *Walton* remained the law and that, in any event, *Teague v. Lane*, 489 U.S. 288 (1989), barred applying *Jones* to Summerlin's case.

When the Ninth Circuit heard the case, it characterized the Sixth Amendment sentencing claim as an "*Apprendi*" claim. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Relying on *Walton*, the Ninth Circuit panel rejected the *Apprendi* claim along with Summerlin's other claims. However, the panel remanded the case for an evidentiary hearing to determine whether the trial judge was impaired by marijuana use during the trial and sentencing in 1982–83. *Summerlin v. Stewart*, 267 F.3d 926, 956–57 (9th Cir. 2001) (*withdrawn*).

Summerlin and Arizona petitioned for en banc review. While those petitions were pending, this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). The Ninth Circuit judges voted to hear the case en banc and asked the parties to file simultaneous briefs addressing whether *Teague* bars retroactive application of *Ring* to cases on collateral review.

The Ninth Circuit held that *Ring* announced a new rule. The court also found that the rule announced in *Ring* does not fall within *Teague*'s first exception to the general rule of non-retroactivity that places conduct beyond a legislature's power to proscribe or punish. (Appendix A, at 44; slip. op. at 12759–60.)

Nevertheless, a majority of the en banc panel held that *Ring*'s rule applies retroactively. The court reached this conclusion on two alternative theories. First, the court found that *Ring* changed the substantive statutory law of Arizona by creating a "capital murder" offense. (Appendix A, at 28–41; slip. op. at 12740–55.) New substantive rules are applied retroactively. *See Bousley v. United States*, 523 U.S. 614, 620 (1998). Second, the court concluded that to the extent *Ring* announced a procedural rule, it was a "watershed" rule falling within *Teague*'s second exception to non-retroactive application of new constitutional rules of criminal procedure. (Appendix A, at 44–63; slip. op. at 12760–79.) The majority reserved deciding any of the other penalty-phase errors raised on appeal or Summerlin's cumulative error claim. (*Id.* at 65; slip. op. at 1271.) The court affirmed the district court's judgment denying federal habeas relief on Summerlin's state convictions for sexual assault and murder.

Three members of the en banc court disagreed with both theories. The dissenters pointed out that appellate courts (including the Ninth Circuit) that have addressed the question of whether *Apprendi* applies retroactively have concluded that it does not. Because *Ring* is an application of *Apprendi* to capital cases, there is no logical basis for distinguishing between their respective new rules for *Teague* purposes. (Appendix A, at 70–74; slip. op. at 12789–91.) The dissenters also rejected the majority's conclusions that the rule announced in *Ring* comes within *Teague*'s second exception by altering our understanding of bedrock procedural principles and is exempt from harmless error analysis. The dissenters noted that the majority's position is inconsistent with this Court's suggestion in *Ring* that the underlying Sixth Amendment violation is subject to harmless error analysis. (*Id.* at 82–83; slip. op. at 12799–800.) Finally, the dissenters took issue with the majority's conclusion that jury participation in the sentencing process seriously increases the accuracy of the sentencing proceeding. (*Id.* at 78–82; slip. op. at 12795–99.)

REASONS WHY THE WRIT SHOULD ISSUE

This case merits review by this Court for at least four reasons. First, the Ninth Circuit's decision below directly conflicts with the holdings of the Arizona Supreme Court in *State v. Towery*, 64 P.3d 828 (Ariz. 2003) on two important federal questions, creating an impasse in capital litigation: (1) Did *Ring* announce a substantive rule? (2) If not, does the *Ring* rule come within *Teague*'s second exception as a watershed procedural rule? (Appendix B, at ¶¶ 10–13; 17–22.) Second, the Ninth Circuit's decision expressly conflicts with the decisions of the Eleventh and Tenth Circuit Courts of Appeal and with decisions of other state appellate courts of last resort. Other federal and state courts await this Court's ruling on these federal questions. Third, the Ninth Circuit's unique conclusion that a new constitutional rule should be applied retroactively to cases on collateral review if the rule can be read to have a substantive gloss injects confusion into this Court's *Teague* jurisprudence. Fourth, by not addressing the issue of whether Summerlin's violent prior felony constitutes an aggravating circumstance exempt from the *Ring* analysis, the Ninth Circuit implicitly decided an important federal question in a way that conflicts with *Ring*, *Apprendi*, and *Almendarez-Torres*.

1. The Ninth Circuit's decision on an important federal question squarely conflicts with a decision by the Arizona Supreme Court.

This Court held in *Apprendi* that under the Sixth Amendment a non-capital defendant cannot be exposed "to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. 466, 483 (2002) (emphasis in original).

In *Ring*, this Court extended the reasoning of the *Apprendi* rule to capital cases, overruling in part *Walton v. Arizona*, 497 U.S. 639 (1990). This Court held that because Arizona's capital sentencing statutes did not expose a defendant convicted of first-degree murder to the death penalty until at least one aggravating circumstance is found,

a jury, rather than a judge, must determine whether such a circumstance exists.

In the instant case, the en banc panel of the Ninth Circuit concluded that the holding in *Ring* entitles Summerlin to have a jury find the two aggravating circumstances present in his case that exposed him to the death penalty.

However, this Court held in *Teague* that new constitutional rules of criminal procedure do not apply to cases that become final before the new rules are announced. 489 U.S. at 310. *Teague* provides two exceptions to the general rule against retroactive application: First, the new rule applies retroactively if it places a class of private conduct beyond the power of the criminal law-making authority to proscribe or punish. *Id.* at 311. Second, the new rule applies retroactively if (1) it is a watershed rule that "alters our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction," *id.* (quoting Justice Harlan's opinion concurring and dissenting in part in *Mackey v. United States*, 401 U.S. 667, 693 (1971)) (internal quotation marks omitted; emphasis added in *Teague*), *and* (2) without the new rule "the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313.

Relying principally on this Court's decisions in *Bousley v. United States*, 523 U.S. 614 (1998), and *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), and Ninth Circuit decisions in *United States v. Montalvo*, 331 F.3d 1052 (9th Cir. 2003), and *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), the Ninth Circuit held in the instant case that *Ring* announced a substantive new rule for Arizona law that falls outside the scope of *Teague*:

> A careful analysis of the structure and history of the relevant Arizona statutes, coupled with a close examination of the underlying rationale of *Ring* and the Supreme Court's related jurisprudence, reveals that *Ring* is, as to Arizona, a "substantive" decision, even if its form is partially procedural.

. . . .

> *Ring* confirmed what we stated in *Adamson* [*Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc)]: Under substantive Arizona law, there is a distinct offense of capital murder, and the aggravating circumstances that must be proven to a jury in order to impose a death sentence are elements of that distinct capital offense.

(Appendix A, at 32, 36; slip. op. at 12745, 12749.)

Alternatively, the Ninth Circuit concluded that *Ring* fell within *Teague*'s second exception:

> In addition to *Ring*'s substantive effect on Arizona law, a full *Teague* analysis of the unique procedural aspects of *Ring* provides an independent basis upon which to apply *Ring* retroactively to cases on collateral review.

(*Id.* at 42; slip. op. 12758.)

> The rule announced in *Ring*, like other watershed rules, is designed to reduce significantly the risk of an erroneous capital verdict. Thus, the rule announced in *Ring* defines structural safeguards implicit in our concept of ordered liberty that are necessary to protect the fundamental fairness of capital murder trials. *Ring* satisfies the criteria of *Teague* and must be given retroactive effect on habeas review.

(*Id.* at 63; slip. op. 12779–80.)

On each of these important federal questions, the Arizona Supreme Court reached the opposite conclusion in *State v. Towery*. In rejecting the petitions for review from post-conviction relief proceedings in that consolidated case, the Court held that the rule in *Ring* does not apply retroactively to cases on collateral review:

> Petitioners assert that *Ring II* [this Court's opinion in *Ring*] announced a substantive rule because it determined the essential elements of capital murder in Arizona. They argue that *Ring II* refined the definition of an element of capital offenses, which is unquestionably a substantive decision. We disagree. Although the Supreme Court recognized that Arizona's aggravating factors operate as the functional equivalent of an element of a greater offense, *Ring II* did not announce a substantive rule.

(Appendix B, at ¶ 11; *Towery*, 64 P.3d 828, ¶ 11 (Ariz. 2003).[2]

> The new rule of criminal procedure announced in *Ring II* thus does not meet either of the exceptions to *Teague*'s general rule that new rules do not apply retroactively to cases that have become final.

Id. at ¶ 25; *Towery*, 64 P.3d at ¶ 25.

This direct conflict in the law creates a morass for capital litigation in Arizona. Currently, 88 prisoners under state judgments of execution are *not* entitled to relief in state court under *Towery*, but *are* entitled to relief in federal court under the Ninth Circuit's decision below. *But see* 28 U.S.C. § 2244(b)(2)(A) (limitation on successive federal habeas applications). Only this Court can break this legal stalemate.

2. The Ninth Circuit's holdings on these important federal questions clash with express holdings of other United States Courts of Appeal, as well as with other state appellate courts of last resort.

The Tenth Circuit reached the opposite conclusion from that of the Ninth Circuit on whether *Ring* created a substantive or procedural rule

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2. Towery petitioned this Court for a Writ of Certiorari to the Arizona Supreme Court, but moved to dismiss his petition after the Ninth Circuit issued its *Summerlin* decision.

for purposes of a *Teague* analysis. In *Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002), the court reasoned that their holding in *United States v. Mora*, 293 F.3d 1213 (10th Cir. 2002), that *Apprendi* was a procedural rule compelled a finding that *Ring* similarly implicates a procedural rule:

> Cannon's attempt to distinguish *Ring* from *Apprendi* is unconvincing, and this panel is bound by the determination in *Mora* that *Apprendi* established a new rule of criminal procedure.

Cannon, 297 F.3d at 224.

The Eleventh Circuit also arrived at the opposite conclusion from that of the Ninth Circuit regarding this important federal question. In *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), the court held that *Teague* barred Turner's *Ring* claim:

> *Ring* constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing. [citation omitted] *Ring* changed neither the underlying conduct the state must prove to establish a defendant's crime warrants death nor the state's burden of proof. *Ring* affected neither the facts necessary to establish Florida's aggravating factors nor that State's burden to establish those factors beyond a reasonable doubt. Instead, *Ring* altered only *who* decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure.
>
> Our conclusion that *Ring* announces a procedural rule is bolstered by *Ring*'s status as an extension of *Apprendi*. We agree with other courts who have concluded that because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule.

Turner, 339 F.3d at 1284 (emphasis in original); *cf. United States v. Gonzales*, 327 F.3d 416, 417–22 (5th Cir. 2003) (the rule announced in *Castillo v. United States*, 530 U.S. 120 (2000), is procedural, not substantive, because it shifted the fact-finding responsibility from judge to jury, and did not alter the meaning of the fact to be found); *Brice v. State*, 815 A.2d 314, 321 (Del. 2003) (the statutory change prompted by the *Ring* decision that required jurors to find the existence of at least one aggravating circumstance beyond a reasonable doubt was procedural, not substantive).

Contrary to the Ninth Circuit, the Eleventh Circuit also concluded that the rule in *Ring* did not fall within the second *Teague* exception:

> *Ring* is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context. *Ring* simply does not fall within the ambit of the second *Teague* exception.

Turner, 339 F.3d at 1286; *cf. Gonzales*, 327 F.3d at 422 (the *Castillo* rule also does not fall within the second *Teague* exception).

The Nevada Supreme Court also reached the opposite conclusion from the Ninth Circuit on this issue. In deciding whether *Ring* should apply retroactively, the Nevada Supreme Court first adopted the "general framework of *Teague*," but reserved its prerogative "to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity." *Colwell v. State*, 59 P.3d 463, 471 (Nev. 2002). The court then concluded, under a non-retroactivity exception "at least as broad" as *Teague*'s second exception, *id.*, that *Ring* did not fall within *Teague*'s second exception:

> *Ring* established that jurors, not judges, must make any factual findings necessary for imposition of the death penalty. Is this a procedure without which the likelihood of an accurate conviction—or, in this case, a sentence—is seriously diminished? We conclude that it is not. The Supreme Court

> in *Ring* did not determine that factfinding by either juries or judges was superior in capital cases. . . . [W]e believe it is clear that *Ring* is based simply on the Sixth Amendment right to a jury trial, not on a perceived need to enhance accuracy in capital sentencing, and does not throw into doubt the accuracy of death sentences handed down by three-judge panels in this state. We conclude therefore that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence.

Id. at 473.

The Supreme Court of Nebraska followed the same analysis in *State v. Lotter*, 664 N.W.2d 892, 904–08 (Neb. 2003), holding that the new constitutional rule announced in *Ring* was procedural, not substantive, and that it did not fit within *Teague*'s second exception. Thus, *Lotter* also squarely conflicts with the Ninth Circuit's holding in this case. *Cf. People v. Bradbury*, 68 P.3d 494, 499 (Colo. 2002) (finding nothing in *Ring* that would compel or suggest that *Apprendi* be applied retroactively). *But see State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (rejecting the *Teague* analysis, and applying *Ring* retroactively under this Court's prior test for retroactive application).

Other federal and state courts have declined to apply *Ring* to convictions that were final on the date *Ring* was decided. *Whitfield v. Bowersox*, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003); *Moore v. Kinney*, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (en banc); *Bottoson v. Moore*, 833 So. 2d 693, 694–95 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002).

This Court should accept certiorari in this case to resolve the conflict that now exists between the Ninth Circuit and every other reported federal circuit and state court of last resort that, to date, has decided these two *Teague* retroactivity questions. Without such

resolution, capital defendants in the same procedural posture will be treated differently.

3. Left intact, the Ninth Circuit's view of substantive changes will spawn uncertainty in capital litigation and confound future attempts to apply the *Teague* analysis.

In deciding that *Ring* was substantive in part, the Ninth Circuit relied on *Bousley v. United States*, 523 U.S. 614, 620 (1998). In *Bousley*, this Court stated:

> And because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the *meaning* of a criminal statute enacted by Congress.

(Emphasis added.) "This distinction between substance and procedure is an important one in the habeas context." *Id.* Citing to *Bousley*, the Ninth Circuit correctly stated, "a new rule is one of 'substance' if it alters the scope or modifies the applicability of a substantive criminal statute." (Appendix A, at 29; slip. op. at 12741–42.)

The Ninth Circuit erred, however, in applying that principle to Arizona's capital *sentencing* statute. In *Ring*, this Court did not decide the *meaning* of the Arizona capital sentencing statute. Nor did this Court alter the scope of or modify Arizona's capital sentencing statute. It did not redefine any statutory construction, nor did the parties dispute the meaning of any statutory provision. Nevertheless, the Ninth Circuit concluded that *Ring* was substantive in nature for Arizona and therefore outside the clearly established bounds of *Teague*. (*Id.* at 28–42; slip. op. at 12740–55.) The majority stated in part:

> [W]e respectfully disagree with *Towery*'s conclusion that *Ring*'s rule is entirely procedural. *Ring*'s invalidation of Arizona's capital murder statute under the United States Constitution did more than alter "who decides." *Towery*, 64 P.3d at 833. It restructured Arizona law and it redefined, as

> a substantive matter, how that law operates. It is, thus, incorrect to conclude that the repositioning of aggravating factors as elements of a separate offense did not constitute a "substantive" rule. Such a construction ignores that *Ring*'s restructuring of the elements of the separate offense of capital murder is, at the very least, a determination of the "meaning of a criminal statute," which is precisely the kind of decision that *Towery* itself recognizes as "substantive."

(*Id.* at 40; slip. op. at 12753.)

This boundless interpretation of the term "substantive" opens the door to untold litigation. *Teague* clarified how "the question of retroactivity should be resolved for cases on collateral review." *See Teague*, 489 U.S. at 300. *Summerlin* corrupts the *Bousley* rule to create uncertainty surrounding when a new rule will apply to any criminal case that has become final. And it injects doubt as to whether *Apprendi*, the precursor of *Ring*, is applicable to cases on collateral review. Although the Ninth Circuit struggled to draw a Sixth Amendment distinction between the Arizona and the New Jersey laws at issue in the two cases, that distinction is unconvincing.

Furthermore, if this Court's decision in *Ring* is substantive, it invites the argument that Arizona cannot reimpose a death sentence under its newly amended capital sentencing statute without violating the *Ex Post Facto* Clause, or even the Double Jeopardy Clause. Regardless of the merit of any such claim, it is another issue that will prolong capital litigation and foster uncertainty.

4. Because the trial court found a prior conviction, this case is outside the holding of *Ring*.

The trial court found that Summerlin had a prior felony conviction involving the use or threat of violence against another person. Under *Almendarez-Torres*, the Sixth Amendment jury trial guarantee does not extend to findings of prior convictions. 523 U.S. at 226. *Ring* did not overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

Ring, 536 U.S. at 597 n.4 (because no aggravating circumstance in *Ring* related to past convictions in his case, he did not challenge *Almendarez-Torres*). Although Arizona argued below that this fact removed the *Summerlin* case from the holding of *Ring*, the Ninth Circuit did not address this argument.

Because the trial court in this case found that Summerlin had been convicted of a violent felony prior to his capital sentencing hearing, Summerlin was exposed to the death penalty, and this case is outside the scope of the holding of *Ring*.[3]

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3. Questions regarding the scope of the *Ring* holding, including a question of whether a finding of harmless error regarding the aggravating circumstance of a prior conviction for a violent felony, are pending before this Court in the State of Arizona's Petition for a Writ of Certiorari in *Arizona v. Pandeli*, No. 03-15.

CONCLUSION

This case merits review to settle issues important to the administration of the death penalty. The Ninth Circuit's resolution of two important federal questions is directly contrary to the opinions of other federal circuit courts of appeal and state courts of last resort. Unless overturned, *Summerlin* directly controls federal capital habeas cases in Ninth Circuit states where judges made some or all of the capital sentencing decisions before this Court's ruling in *Ring* (Arizona, Nevada, Idaho, and Montana). *Summerlin* will also create uncertainty regarding the applicability of *Ring* in other jurisdictions (Colorado, Nebraska, Alabama, Delaware, Florida, and Indiana) where judges made relevant sentencing decisions pre-*Ring*.

Left intact, the Ninth Circuit's interpretation of *Ring* will result in extensive litigation over this Court's settled *Teague* jurisprudence. In the interest of fairness to the parties and to homicide victims, the issue of *Ring* retroactivity should be addressed and resolved by this Court. Accordingly, and based on the foregoing authorities and arguments, Petitioner respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

Volume 1 of 2

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WARREN WESLEY SUMMERLIN,)		
Petitioner-Appellant,	)	No. 98-99002
v.	)	D.C. No.
TERRY L. STEWART, Director of	)	CV-86-00584-ROS
Arizona Department of Corrections,	)	OPINION
Respondent-Appellee.	)	
	)	

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
October 10, 2000—Pasadena, California
Opinion Filed October 12, 2001
Withdrawn February 11, 2002
Order Granting En Banc Hearing
November 23, 2002
Argued and Submitted December 10, 2002

Filed September 2, 2003

Before: Mary M. Schroeder, Chief Judge, and
Harry Pregerson, Stephen Reinhardt,
Diarmuid F. O'Scannlain, Michael Daly Hawkins,
Sidney R. Thomas, M. Margaret McKeown,
Kim McLane Wardlaw, Raymond C. Fisher,
Richard C. Tallman, and Johnnie B. Rawlinson,
Circuit Judges.

Opinion by Judge Thomas;
Concurrence by Judge Reinhardt;
Dissent by Judge Rawlinson

COUNSEL

Ken Murray and Leticia Marquez, Federal Public Defender's Office, Phoenix, Arizona, for the petitioner-appellant.
John Pressley Todd, Attorney General's Office, Phoenix, Arizona, for the respondent-appellee.

OPINION

THOMAS, Circuit Judge:

In this appeal we consider whether the district court erred in denying a writ of habeas corpus sought as to petitioner's conviction and death sentence. We affirm the district court's judgment as to the conviction. However, we conclude that the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), applies retroactively so as to require that the penalty of death in this case be vacated.

I

It is the raw material from which legal fiction is forged: A vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge. But, as Mark Twain observed, "truth is often stranger than fiction because fiction has to make sense."

There is no doubt that Warren Summerlin is an extremely troubled man. He has organic brain dysfunction, was described by a psychiatrist as "functionally retarded," and has explosive personality disorder with impaired impulse control. His father was a convicted

armed robber who was killed in a shootout. As a youth, his alcoholic mother beat him frequently and punished him by locking him in a room with ammonia fumes. At his mother's behest, he received electroshock treatments to control his explosive temper. He dropped out of school in the seventh grade due to dyslexia and committed numerous petty juvenile offenses. In 1975, he was diagnosed as a paranoid schizophrenic and treated with the anti-psychotic medication Thorazine.

Before his murder conviction, his only dangerous adult felony was a conviction for aggravated assault. That conviction arose out of a road rage incident in which a car veered off the road, jumped the curb and struck Summerlin's wife, who was hospitalized for her injuries. At the scene, Summerlin brandished a pocket knife at the errant driver, an act that occasioned the filing of the criminal assault charge. Summerlin was not convicted of this offense until after these capital proceedings had commenced. However, this conviction later served as one of two statutory aggravating factors that qualified Summerlin for the death penalty.

On the morning of April 29, 1981, Brenna Bailey, a delinquent account investigator for Finance America, went to Summerlin's home to speak with Summerlin's wife about an overdue account. When Bailey's boyfriend, Marvin Rigsby, learned that she had not returned to work as scheduled, he obtained the addresses of the places she had planned to visit that day and began to retrace her travel. In the early evening, he spoke with Summerlin, who told Rigsby that Bailey had left that residence at 10:30 a.m. The woman residing at the next address Bailey was slated to visit told Rigsby that she had been home all day and had not received a visit from anyone. After making additional attempts to find Bailey, Rigsby reported Bailey's disappearance to the police that evening.

Later that evening, the police received a tip from a female caller to an anonymous crime hotline service who stated that she believed that the missing woman from "Pacific Finance Company" had been murdered by Summerlin, who had rolled up the victim's body in a carpet. The caller later was identified as Summerlin's mother-in-law

who testified that the basis of her information was her daughter's extra-sensory perception.

Early the next morning, a road paving crew outside a market approximately a mile from the Summerlin residence alerted the market's manager to a smell emanating from the trunk of a parked car, later determined to have been owned by Bailey. The manager recognized the odor as that of a decaying body and telephoned the police. Upon arrival, the officers observed a pair of panties, pantyhose, and shoes on the floorboard of the back seat. They forced open the trunk and found Bailey's body, wrapped in a bloody bedsheet. Her skull was crushed, and she was partially nude.

The police obtained a search warrant for the Summerlin residence and found numerous items of incriminating evidence. After the search warrant was read to Summerlin, he stated, "I didn't kill nobody." When the detective did not respond, Summerlin asked: "Is this in reference to the girl that was at my house?" In response to the officer's inquiry as to which girl he was referring, Summerlin described Bailey. Summerlin's wife identified the bloody bedspread found with the victim as belonging to the Summerlin household. Summerlin was then arrested for the murder of Brenna Bailey. At the police station, Summerlin asked to speak to his wife and then made several incriminating statements while police officers were within listening distance.

The state trial court appointed the public defender's office to represent Summerlin. The first attorney assigned to the case moved for a mental competency examination pursuant to Ariz. R. Crim. P. 11. Thereafter, the assigned attorney left the public defender's office, and an attorney whom we shall refer to as "Jane Roe" was designated to represent Summerlin.

In June 1981, Summerlin was examined by two court appointed psychiatrists, Drs. Maier Tuchler and Otto Bendheim. Each found him competent to stand trial and legally sane under the *M'Naghten* standard, which then governed the determination of competency under Arizona

law. Although there was no evidence of mental disease or defect, Dr. Tuchler observed that dyslexia and illiteracy made Summerlin "functionally mentally retarded." He further found that Summerlin's impulse control was extremely impaired due to an explosive-type personality disorder and that he had an antisocial personality. Upon reading the reports, Judge David G. Derickson found Summerlin competent to stand trial.

During this time period, Roe had conversations with Dr.Leonardo Garcia-Bunuel, a psychiatrist who treated Summerlin at the Maricopa County Jail, regarding a possible diagnosis of psychomotor epilepsy. Summerlin had described to Dr. Garcia-Bunuel details of the murder, particularly his experiences of sensing an intense perfume odor, and this led Dr. Garcia-Bunuel to suspect that Summerlin may have had a temporal lobe seizure at the time of the killing. Subsequently, in August 1981, Roe arranged for neurological testing by Dr. Mark Winegard. An electroencephalogram (EEG) showed some slowing in Summerlin's posterior temporal area but was insufficient to support a diagnosis of epilepsy. CAT scans and a second EEG performed in October 1981 were normal. As a result, Dr. Garcia-Bunuel withdrew his concerns.

Roe also secured a psychological evaluation of Summerlin from Dr. Donald Tatro in November 1981. Although concluding there was no evidence to support an insanity defense, Dr. Tatro found indications of organic brain impairment, borderline personality disorder, and paranoid personality disorder. In Dr. Tatro's opinion, Summerlin "is deeply emotionally and mentally disturbed, unaware of the motives underlying much of his behavior, and unable, because of his problems, to exercise normal restraint and control, once his highly unstable and volatile emotions are aroused."

In November 1981, Roe began plea negotiations with the prosecution and obtained an extremely favorable plea agreement, which Summerlin entered into on November 17, 1981. The prosecutor, whom we will call "John Doe," had been willing to enter into the agreement because he did not believe that the offense satisfied the Arizona legal

standard of "heinous, cruel and depraved." At the time, Summerlin had not been convicted of the aggravated felony arising out of the road rage incident, so it did not qualify as an aggravating factor under Arizona's capital sentencing statute. *See* Ariz. Rev. Stat. § 13-703(F)(2) (1981) (amended in 1993). Thus, Doe did not believe that Summerlin had committed a capital offense.

Under the proposed plea agreement, Summerlin was to enter an *Alford* plea, *see North Carolina v. Alford*, 400 U.S. 25 (1970), which enabled him, without admitting guilt, to plead guilty to second-degree murder and aggravated assault and to be sentenced accordingly. The agreement stipulated that Summerlin would be sentenced to twenty-one years in prison for the murder of Ms. Bailey, of which he would be required to serve fourteen. In exchange, Summerlin would plead guilty to aggravated assault for the road rage incident with a maximum sentence of fifteen years and would admit that he violated his probation in another case charging burglary. The plea agreement provided that Summerlin's sentences on the three charges would run concurrently. However, the agreement was subject to court approval. If the court rejected the stipulated sentence, Summerlin could either (1) allow his plea to stand and be sentenced to a term of up to thirty-eight-and-one-half years, according to the court's sole discretion, or (2) withdraw from his plea of guilty and have the matters proceed to trial and disposition.

On the day he entered the plea, Summerlin properly answered all the questions required to validate his *Alford* plea. He had second thoughts a few days later, however, and formally sent to the court a *pro se* motion to withdraw his plea and to fire his public defender. In a court appearance on December 15, 1981, scheduled to address his motion, Summerlin openly registered dissatisfaction with the plea, the stipulated sentence, and Roe's handling of his case.

After hearing his complaints, Judge Derickson denied Summerlin's motions, but took the occasion to inform Summerlin that it was his intention on the upcoming sentencing date not to accept the stipulated sentence. Therefore, Summerlin would have the option either

to withdraw from the plea or to allow it to stand and be sentenced accordingly.

Realizing that her client's intention to withdraw from the agreement might again make him eligible for the death penalty, Roe promptly attempted to have the case transferred to another judge who might look more favorably on the deal. On December 18, 1981, the presiding judge denied her motion to disqualify Judge Derickson on the ground of prejudice towards her client and allowed Judge Derickson to continue with the case.

That same evening, Roe attended a Christmas party. She and prosecutor Doe left the party together and had what she later described as a "personal involvement . . . of a romantic nature." As a result of that, as she later testified, she felt she "could no longer ethically represent Mr. Summerlin." Because of the circumstances, she believed "that it would be appropriate for another Public Defender to handle the case and take it to trial, since it looked like it might be a trial at that point, because Mr. Summerlin indicated he wanted a trial and Judge Derickson had indicated he was going to reject the plea." She reported the situation to her supervisor, and it was determined that the entire office probably was compromised.

Notwithstanding her belief that she could not represent Summerlin due to a personal conflict of interest, Roe took no immediate steps to accomplish her withdrawal. Neither she nor her office informed either the court or their client of her conclusion that she could no longer be Summerlin's attorney. Instead, she accompanied him to and represented him at the next hearing before Judge Derickson on December 22, 1981.

At the hearing, Judge Derickson advised Summerlin of his decision not to be bound by the sentencing part of the plea agreement, and that if Summerlin allowed his plea to stand, he was facing up to thirty-eight-and-one-half years in prison for the three offenses. After some confusion during which Summerlin told the court twice that he did not understand the Judge's explanation of the sentence he now

might face, Roe privately conferred with her client. Their discussion ended with Roe's statement to the court, "I believe he understands, your Honor." Summerlin's immediate response was, "No, I don't understand," to which Roe replied, "Then what is your question?" Summerlin then asked about the number of years he might face on the three charges. Judge Derickson explained again the sentence that Summerlin would face if he permitted his plea to stand. To this Summerlin said that he finally understood, adding, "Okay. I would like to withdraw from my plea agreement. Is that what you want me to say?" Judge Derickson appropriately told Summerlin that he did not "want" Summerlin to say that, he simply wanted to make sure that Summerlin understood what would happen if he permitted the plea to stand. This exchange prompted another confidential discussion between Summerlin and Roe, followed by Summerlin's statement that, "It says, if this plea agreement should be changed in any way, I can withdraw." "Yes, that's the question he asked you," Roe replied. Summerlin then withdrew from the agreement. The court immediately reinstated his pleas of not guilty to the two consolidated cases, vacated its findings in the pending probation violation matter, and ordered that the matters be sent to the presiding judge for trial setting. Summerlin's courtroom decision to withdraw his plea made him eligible for a conviction of first-degree murder and a sentence of death.

At this point in the hearing, Summerlin moved once again for new counsel. Roe remained silent. The court denied his motion, stating that "the record may further reflect that you failed to establish any grounds upon which counsel should be changed." Judge Derickson later submitted an affidavit indicating that had he then known of the conflict, he would have granted Summerlin's request to change counsel and would have continued the proceeding rather than proceeding with the plea colloquy.

On December 28, 1981, six days after Summerlin withdrew his plea, Roe finally broached the problem with Doe. On behalf of her client, she wanted Doe to stay on the case because he favored disposing of it with a lesser plea. He could discern no reason to step down as the prosecutor. After this discussion, a hearing was arranged for December

28, 1981, at which Roe planned to move to withdraw as counsel and to permit the rest of the Public Defender's Office to withdraw also. By this time, the case had been assigned to another judge, Judge Riddel, for trial. On December 28, Judge Riddel's calendar was being handled by Judge McCarthy. Roe did not inform Summerlin of her intent to seek withdrawal or of the conflict that had precipitated her decision. At the hearing, Judge McCarthy began by noting that it had been "brought to the attention of the Court that defendant Mr. Summerlin is dissatisfied with the legal representation he is presently receiving." The judge asked Summerlin if that was correct, to which Summerlin responded, "Yes, sir." The judge then noted that he had spoken with counsel in chambers "and apparently it is their feeling that it would be in the best interest of justice that new counsel be appointed." Judge McCarthy then appointed George Klink, a private practitioner, as new counsel. Following the reassignment of counsel, Roe did not advise Summerlin of her conflict of interest because she saw "no reason to beat a dead horse." Klink then assumed representation of Summerlin in both of the charges stemming from Bailey's murder and in the separate charge of aggravated assault arising out of the road rage incident, which was unrelated to the murder.

Approximately six weeks later, the Arizona Attorney General's Office assumed control of the prosecution due to the conflict of interest between Doe and Roe. The Attorney General made it plain that the case would not be settled by way of a lesser plea. Klink filed a motion disqualifying Judge Riddel, and Summerlin's murder case was then assigned to Judge Philip Marquardt.

Klink had intended to disqualify Judge Riddel as to the separate aggravated assault charge filed on the basis of the road rage incident. However, he failed to take the appropriate measures to accomplish this aim. After discovering this, Klink moved for a continuance of the assault trial because he was unprepared. His motion was denied and the assault trial proceeded. Klink called only one witness, Summerlin's wife. Summerlin was convicted of aggravated assault and this conviction served several months later as one of the two aggravating circumstances in the penalty phase of his murder trial.

Klink spoke with Roe about the murder case and the medical reports. However, he never spoke with any of the experts who had interviewed Summerlin. He attempted to get another psychiatric expert, but he failed.

Klink's main defense theory for the murder trial was Summerlin's putative lack of premeditation. Klink presented no evidence supporting that theory. He cross-examined several prosecution witnesses in an attempt to cast reasonable doubt on the rape charge as a way of proving lack of premeditation. Because the prosecution offered no psychiatric evidence, Klink could not cross-examine anyone regarding Summerlin's psychiatric problems and how they would affect his ability to premeditate the murder. Klink called only one witness, Roe, and he only asked her a few questions in order to impeach one of the coroner's statements regarding the length of time seminal fluid remains in the body. The entire case lasted only four days, and the jury was out for a little over three hours. The jury found Summerlin guilty of both first-degree murder and sexual assault.

The judge set a sentencing hearing to hear testimony and argument on aggravating and mitigating circumstances approximately one month after the verdict. In that month, Klink never met with Summerlin. Klink knew that the prosecution planned to call Drs. Tuchler and Bendheim at sentencing, but he never contacted either of them. Klink knew that Summerlin had been convicted of only one dangerous felony—the aggravated assault that Klink had tried before another judge. He also knew of mitigating circumstances surrounding that assault, including that the victim was not physically harmed and that Summerlin's reaction was in response to witnessing the woman striking his wife with her car. Klink nonetheless did not present this information to the judge. Klink prepared no evidence regarding Summerlin's social history despite references in Dr. Tatro's report that Summerlin possibly experienced severe physical and emotional abuse in his childhood.

The sentencing hearing commenced on the afternoon of July 8, 1982. It was an extremely short proceeding, extending only twenty-six

transcript pages, more than half of which constituted colloquy between counsel and the court. The court first entertained argument on the defense motion for a new trial, which the judge indicated he would consider over the weekend. The State's aggravation case consisted of only one exhibit, specifically certified copies of documents relating to the aggravated assault conviction. The State then asked the judge to consider the trial testimony and rested its case. The entirety of the State's aggravation case was recorded in one page of transcript.

For the defense case in mitigation, Klink called Dr. Tatro to the stand. However, before the witness could be sworn in, Summerlin interrupted and—although the conversation is not in the trial transcript—apparently requested that his attorney not present Dr. Tatro. Klink requested a five-minute recess, at the conclusion of which he stated: "With the consent of the Defendant, the Defendant has no witnesses in mitigation at this time and . . . we'll rest." The judge then reminded Klink and Summerlin that this was the time set aside for the aggravation and mitigation hearing and that he planned to proceed with sentencing the next Monday. The judge then said, "so you tell me that you have one witness that you may present on Monday?" Klink replied: "Well, I would not call any witnesses at all." The judge then indicated that he would allow Summerlin to make any statement that he wished to make, either at the present hearing or on Monday. Subsequently in the hearing, Klink noted that he would rely on the written report of Dr. Tatro attached to the presentence report. The State proceeded by presenting two rebuttal psychiatric witnesses.

Judge Marquardt advised the parties that he would deliberate over the weekend and announce his decision on Monday. Unbeknownst to Summerlin, Judge Marquardt was a heavy user of marijuana at the time, a fact that the State conceded in the federal habeas proceedings before the district court in this case.[1]

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1. During his later disbarment proceedings, Judge Marquardt admitted that he was addicted to the drug, although he did not specify how long he had been addicted. In support of his allegations against Judge Marquardt, Summerlin submitted to the (continued...)

The amount of marijuana that Judge Marquardt may have used during the trial or deliberations is unknown because the district court did not allow discovery on this issue, although there is record support for Summerlin's claim that Judge Marquardt was either having difficulty concentrating or experiencing short-term memory loss.[2]

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1. (...continued)
district court an official report from the Phoenix Police Department dated June 3, 1991. The report details a purchase of marijuana by Judge Marquardt from Barbara Moffett in May of 1991, which was intercepted from the United States mail by the police. When the delivery went awry, the report states that Judge Marquardt called Barbara Moffett to see if she had spoken to the authorities about the purchase, and when she told him she had not, Judge Marquardt told her that everything would "work out okay" because his daughter Tiffany's boyfriend Butch "was going to take the rap for the marijuana." The official police report also states that Barbara Moffett told Phoenix police in 1991 on the basis of first-hand knowledge that Judge Marquardt "was a frequent user of marijuana, had been when she met him [sixteen years earlier], and has continued to be so since." The envelope in which Judge Marquardt sent a cashier's check to Ms. Moffett for the marijuana carried the printed official heading, "Philip Marquardt, Superior Court Judge, Phoenix, Arizona."

In a separate episode, Judge Marquardt was convicted in 1988 in Texas of misdemeanor possession of marijuana which was found on his person at the port of entry in Houston. *In re Marquardt*, 778 P.2d 241, 242-43 (1989). His apparently false explanation documented in that case was that a stranger gave him the marijuana wrapped in a small piece of plastic that he stuck in his watch pocket. *Id.* at 242. For that offense, the Supreme Court of Arizona suspended him from his judicial position without pay for one year from September 2, 1988, through September 2, 1989, a sanction considered by that court to be more severe than a mere censure or reprimand. *Id.* at 250. Despite this serious and career-threatening incident, Judge Marquardt continued to use marijuana. Eventually, Judge Marquardt stepped down from the bench and was ordered disbarred in Arizona and by the United States Supreme Court after the 1991 incident came to light. *See In re Disbarment of Marquardt*, 503 U.S. 902 (1992); *In re Marquardt*, 821 P.2d 161 (Ariz. 1991).

2. There are instances during pre-trial hearings and at trial when Judge Marquardt exhibited confusion over facts that had just been presented to him. He also made some quite perplexing, if not unintelligible, statements at various times during the trial. Obviously, because there was no discovery or evidentiary hearing permitted, the question of whether these episodes were related to impairment was, and is, unresolved.

In any event, Judge Marquardt adjourned the penalty phase proceedings on Friday, indicating that he would deliberate over the sentence during the weekend and would also consider the motion for a new trial. However, on Monday, he either forgot or elected not to rule on the motion for a new trial and immediately proceeded with sentencing. Judge Marquardt began the hearing simply by announcing the case and inquiring whether Summerlin had anything to say or legal cause to show why judgment and sentence should not be pronounced. Klink stated he knew of no legal cause. Summerlin stated that he had a motion to vacate the judgment for the judge to consider. The judge examined the motion, took a five-minute recess, then denied it. The judge then heard brief oral arguments from the State and from Klink. He neither asked Summerlin whether he had anything further to say nor advised him of his right to allocution with respect to the sentence.

Judge Marquardt then sentenced Summerlin to death after finding two aggravating circumstances and no sufficiently substantial mitigating circumstances. The judge based his decision as to aggravating circumstances on two statutory grounds: (1) that the defendant had a prior felony conviction involving the use or threatened use of violence on another person, Ariz. Rev. Stat. § 13-703(F)(2) (1981) (amended in 1993); and (2) that Summerlin committed the offense in an especially heinous, cruel, or depraved manner, *id.* § 13-703(F)(6). He found no mitigating circumstances.

The same day, Judge Marquardt also sentenced James Clifford Fisher to death. Fisher had been charged with murdering Marguerite Bailey—no relation to Brenna Bailey—with a blunt instrument. *See State v. Fisher,* 686 P.2d 750, 758 (Ariz. 1984). As in the case with Summerlin, Judge Marquardt found two aggravating circumstances (including that the victim had been killed in an especially heinous and depraved manner) and no mitigating circumstances sufficiently substantial to call for leniency. *Id.* at 775-76. Fisher eventually received post-conviction relief on the basis of an unethical plea agreement that Judge Marquardt expressly entered into as a party and subsequently allowed into evidence at trial. *See State v. Fisher,* 859 P.2d 179, 184

(Ariz. 1993). Summerlin alleges that Judge Marquardt confused some of the facts between the cases during Summerlin's sentencing hearing.

The Supreme Court of Arizona reviewed and affirmed Summerlin's convictions and his sentence. *See State v. Summerlin*, 675 P.2d 686 (Ariz. 1983), *recons. den.* Jan. 17, 1984. After an initial petition for writ of habeas corpus in federal district court and four unsuccessful post-conviction attempts in state court to overturn his conviction, Summerlin filed a second amended petition for writ of habeas corpus in the federal district court in Arizona on November 22, 1995. *See* 28 U.S.C. § 2254 (1994). The federal district court denied Summerlin's second amended petition for writ of habeas corpus on October 31, 1997. Pursuant to Fed. R. Civ. P. 59(e), Summerlin moved to vacate the judgment on November 28, 1997. The district court denied this motion on January 12, 1998. However, the district court issued a certificate of probable cause enabling Summerlin to appeal pursuant to Fed. R. App. P. 22(b)(1). This timely appeal followed.

A divided three-judge panel of this Court issued its opinion on October 12, 2001, affirming the district court in part and reversing in part. *See Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001). The case was remanded for an evidentiary hearing as to whether Judge Marquardt was competent when he was deliberating on whether to impose the death penalty. *Id.* at 957.

In the meantime, the United States Supreme Court granted certiorari in *State v. Ring*, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 534 U.S. 1103 (2002), which involved a potential reexamination of Arizona's death penalty statute in light of the Sixth Amendment. Because this was an issue that had been raised by Summerlin in his state and federal court petitions, the panel withdrew its decision and deferred submission of the case pending the Supreme Court's resolution of *Ring*. *See Summerlin v. Stewart*, 281 F.3d 836, 837 (9th Cir. 2002). Later that year, the Supreme Court issued its decision in *Ring v. Arizona*, holding that Arizona's capital sentencing scheme was incompatible with the Sixth Amendment right to a trial by jury. 536 U.S. at 609.

Following the Supreme Court's *Ring* decision, Summerlin moved to stay the proceedings in this case. Summerlin desired the stay so that he could request that the Arizona Supreme Court recall the mandate in his direct appeal to consider *Ring's* application to his case. Such a procedure is cognizable under Arizona state law. *See Lindus v. N. Ins. Co. of N.Y.*, 438 P.2d 311, 313 (Ariz. 1968) (describing doctrine); *see also State v. Ariz. Dep't of Corrs.*, 928 P.2d 635, 636 (Ariz. 1996) (applying procedure to consider retroactivity of judicial ruling). The panel granted the stay request. Subsequently, the Arizona Supreme Court denied Summerlin's motion to recall the mandate. This decision exhausted all of Summerlin's potential state remedies. *Cf. Wood v. Kemna*, 13 F.3d 1244, 1245-46 (8th Cir. 1994) (noting that habeas petitioners need not ordinarily resort to extraordinary state remedies, such as recall of the mandate, to satisfy federal exhaustion requirements, but holding that exhaustion might be required when there was a real possibility of relief under extraordinary and unique circumstances).

After the Arizona Supreme Court denied Summerlin's motion to recall the mandate, the panel requested a vote of our Court as to whether this case should be reheard *en banc*. Following an affirmative vote of a majority of the non-recused active members of the Court, *see Summerlin v. Stewart*, 310 F.3d 1221 (9th Cir. 2002), the case was reheard *en banc* on December 10, 2002.

We have jurisdiction pursuant to 28 U.S.C. § 2253. The Warden does not contend that Summerlin failed to exhaust his state remedies or that any of his claims are procedurally defaulted. Because this appeal was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), the right to appeal in this case is governed by AEDPA rules. *See Slack v. McDaniel*, 529 U.S. 473, 482 (2000). However, because the petition for habeas corpus was filed before AEDPA's effective date, pre-AEDPA law governs the petition itself. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

Summerlin argues on appeal that:

1. He did not receive effective assistance of counsel during the guilt phase of his trial in violation of his rights under the Sixth Amendment;

2. The Arizona death penalty statute, as applied to him, is unconstitutional in that it permits a judge rather than a jury to determine the elements necessary for a capital sentence;

3. He did not receive effective assistance of counsel during the sentencing phase of his capital trial in violation of his rights under the Sixth Amendment;

4. His court-appointed public defender had a conflict of interest that adversely affected her representation at a critical stage of the proceedings, in violation of his rights under the Sixth Amendment;

5. He was deprived of his right to due process of law because the trial judge was addicted to marijuana during his trial and deliberated over his sentence while under the influence of marijuana; and

6. Cumulative errors require reversal of his sentence and conviction. Summerlin's only claim specific to the conviction phase alone is his argument that he received ineffective assistance of counsel during his guilt-phase trial. With the exception of his cumulative error contention, the remainder of Summerlin's claims relate to the imposition of the death sentence.[3]

II

Summerlin alleges that he was denied the effective assistance of counsel at the guilt phase of his murder trial in violation of the Sixth Amendment as interpreted in *Strickland v. Washington*, 466 U.S. 668 (1984). We review the dismissal of a habeas petition *de novo,* including the mixed questions of law and fact raised by claims alleging ineffective assistance of counsel. *See Williams v. Woodford*, 306 F.3d 665, 684 (9th Cir. 2002); *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995).

To prevail on this claim, Summerlin must demonstrate first that the performance of his counsel fell below an objective standard of reasonableness, and second that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other. *See id.* at 687.

We begin with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and with the acknowledgment that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. However, defense counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

3. Summerlin's claim that his counsel had a conflict of interest does not implicate the guilt phase because his argument is that he was deprived of a favorable sentence. Summerlin's counsel clarified at oral argument that the claim concerning the trial judge's impairment was limited to the judge's penalty phase deliberations.

professional judgments support the limitations on investigation." *Id.* at 690-91.

Summerlin alleges that his trial lawyer failed to investigate and to present his "only viable defense," namely, that Summerlin had an organic brain dysfunction and an "impaired ability to premeditate or to exercise self-control." To analyze this issue properly, we must examine the mental defenses then available under Arizona law. At the time, Arizona had adopted the *M'Naghten* test "as the sole standard for criminal responsibility." *State v. Ramos*, 648 P.2d 119, 121 (Ariz. 1981) (internal quotation marks omitted). To sustain a defense of legal insanity:

> An accused must have had at the time of the commission of the criminal act: (1) Such a defect of reason as not to know the nature and quality of the act, or (2) If he did know, that he did not know he was doing what was wrong.

State v. Christensen, 628 P.2d 580, 583 (Ariz. 1981).

At the time Summerlin was charged, Arizona already had rejected the affirmative defense of diminished capacity. *See State v. Mott*, 931 P.2d 1046, 1051 (Ariz. 1997) ("Because the legislature has not provided for a diminished capacity defense, we have since consistently refused to allow psychiatric testimony to negate specific intent."). Thus, the situation that confronted Klink was unlike that in *Pirtle v. Morgan*, 313 F.3d 1160, 1169-73 (9th Cir. 2002) (holding that counsel had been constitutionally ineffective for not asserting a diminished capacity defense then available under Washington law).

The Arizona Supreme Court also had held, as a matter of law, that criminal defendants could not present psychiatric testimony to negate the element of specific intent. *State v. Laffoon*, 610 P.2d 1045, 1047 (Ariz. 1980). Arizona did allow the introduction of psychiatric evidence as to a defendant's tendency to act on impulse as probative of an absence of premeditation. *Christensen*, 628 P.2d at 582-83. However,

under Arizona law, the standard for establishing premeditation is not high. The prosecution only need show that the defendant "had time to reflect after forming the intent to kill." *Clabourne v. Lewis*, 64 F.3d 1373, 1380 (9th Cir. 1995) (citing *State v. Neal*, 692 P.2d 272, 276 (Ariz. 1984)). "This length of time could have been as instantaneous as it takes to form successive thoughts in the mind, and premeditation may be proven by circumstantial evidence." *Neal*, 692 P.2d at 276 (citing *State v. Lacquey*, 571 P.2d 1027, 1030 (Ariz. 1977)).

Thus, Summerlin's trial counsel faced formidable legal hurdles in presenting a psychiatric defense at the guilt phase. Nonetheless, counsel conducted a substantial amount of investigation into a potential psychiatric defense. Summerlin's first counsel moved for a mental examination under Ariz. R. Crim. P. 11 to determine whether Summerlin was competent to stand trial. Upon examination, Dr. Tuchler concluded that Summerlin, although "functionally mentally retarded," did not have a mental disease or defect. Before she withdrew from the case, Roe thoroughly investigated Dr. Garcia-Bunuel's suspicion of psychomotor epilepsy. She obtained neurological testing and pursued this possible diagnosis with Dr. Bendheim, as revealed in the following letter the doctor sent to Judge Derickson in December 1981:

> We again discussed the possibility of psychomotor epilepsy, especially in view of Dr. Garcia-Bunuel's findings that this man had very vivid olfactory (smell) hallucinations preceding outbursts. I went over this whole situation again and told Miss [Roe] that the neurologists have been unable to find psychomotor epilepsy, although there was some slowing of the wave patterns in the temporal lobes, where psychomotor epileptic attacks usually originate.
>
> While a positive electroencephalogram, which was not obtained here, would make a positive diagnosis, an essentially negative EEG does not entirely rule out the possibility of epileptic-type seizures, and for this reason

> I see absolutely no harm and potentially quite a bit of benefit to place this defendant on antiepileptic, anti-seizure type medication, even though the diagnosis has not been established.

During post-conviction hearings, Roe testified that she met with trial counsel Klink on two or three occasions and spent a number of hours discussing her investigative efforts and the viability of a possible insanity defense. She stated that she discussed this aspect of the case with Klink "at great length," explaining to Klink the examinations and conclusions of all of the examining doctors. Klink testified that, after consulting with Roe, he made a tactical decision not to pursue an insanity defense due to the lack of evidence.

Klink did not follow up on Dr. Garcia-Bunuel's earlier suspicion of psychomotor epilepsy because the doctor had changed his opinion and was out of the country at the time of trial. Instead, Klink made a decision to defend his client by arguing that the facts and circumstances of the prosecution's case did not support a verdict of first-degree murder. Summerlin himself desired this fact-based defense.

In assessing an attorney's performance, a reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. As the Supreme Court recently reiterated, this evaluation must include "an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct." *Wiggins v. Smith*, ___ U.S. ___, 123 S. Ct. 2527, 2536 (2003) (quoting *Strickland*, 466 U.S. at 688).

[1] A review of the record indicates that Klink's trial performance did not fall below the objective standard of reasonableness required under *Strickland*. In deciding whether to pursue evidence of Summerlin's mental state, Klink was entitled to rely on the opinions of the mental health experts who already had examined Summerlin. *See*

Hendricks, 70 F.3d at 1038. At the time, none of the doctors would opine that Summerlin was suffering from a mental disease or defect that would provide a foundation for an insanity defense. None of the physicians, including Dr. Garcia-Bunuel, was able to diagnose Summerlin as clearly suffering from psychomotor epilepsy. It thus was reasonable for Klink not to investigate this possibility further. *Cf. Wiggins*, 123 S. Ct. at 2536-38 (upholding an ineffective assistance claim against counsel who curtailed investigation despite promising leads in preliminary discovery).

Likewise, given the doctors' inability to make a diagnosis, Klink's tactical decision to forgo presenting what little evidence he had of epilepsy was certainly within the "wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690; *see also Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is also acceptable trial strategy to choose not to call psychiatrists to testify when they can be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion.").

Psychiatric testimony would have been admissible concerning Summerlin's impulsive personality to show absence of premeditation. *See Vickers v. Ricketts*, 798 F.2d 369, 372-73 (9th Cir. 1986). However, under the circumstances of the case, Summerlin has not shown that he was prejudiced by the failure to introduce such testimony. The basis of the State's premeditation theory was not that Summerlin had planned the crime; rather, it was that he formed the required premeditation during the commission of the crime. To prove its point, the State relied on the circumstances surrounding the crime, including the fact that sexual assault occurred prior to the murder and the fact that Summerlin had retrieved a blunt object after the assault to commit the murder.

The State also relied on the uncontroverted evidence as to how the murder was committed, specifically that Bailey had been hit repeatedly and forcefully on each side of her head. As the Supreme Court of Arizona later noted, Summerlin's "excessive and purposeful actions demonstrate more than just a 'reactionary' homicide." *State v. Summerlin*, 675 P.2d at 694. The State underscored this theory with

presentation of graphic photographic evidence of the numerous wounds sustained by Bailey. The State's witness testified that any one of the blows to the victim's head was sufficient to kill the victim, yet numerous, deep lacerations were evident from the photographs.

[2] Klink was not questioned during the post-conviction hearings about his choice not to present psychiatric evidence of impulsiveness, so we do not know whether this decision was strategic. However, after carefully reviewing the record, the district court concluded that there is no reasonable probability the jury would have acquitted Summerlin of first-degree murder had Klink introduced evidence of Summerlin's impulsive personality. The district court therefore concluded that Summerlin could not establish *Strickland* prejudice as to this claim. *See* 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

[3] The district court's assessment was correct. The psychiatric testimony on this point would have been limited to a general description of Summerlin's behavioral tendencies. Given the State's theory, this would have had only marginal probative value in determining whether Summerlin formed premeditation during the commission of the offense. The jury was instructed properly on the State's premeditation theory, which was a correct statement of Arizona law. In this context, and considering the "totality of the evidence," additional psychiatric testimony would not have generated a "reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 123 S. Ct. at 2543. Thus, Summerlin has not established a "probability sufficient to undermine confidence in the outcome" of the guilt phase of his trial. *Strickland*, 466 U.S. at 694.

III

The first penalty-phase question presented to us is whether the Arizona death penalty statute, as applied to Summerlin, is unconstitutional in that it permits a judge rather than a jury to determine

the elements necessary for a death sentence. The Supreme Court recently has held that Arizona's capital sentencing scheme was incompatible with the Sixth Amendment right to a trial by jury "to the extent that it allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. The Supreme Court did not decide whether the holding in *Ring* applied to petitioners, such as Summerlin, who raised the constitutional challenge in collateral post-conviction proceedings rather than on direct appeal.

Because the Warden has argued that *Teague v. Lane*, 489 U.S. 288 (1989), bars relief on this issue, we must decide whether *Ring* has retroactive application to cases on federal habeas review. *Horn v. Banks*, 536 U.S. 266, 272 (2002) (holding that the court of appeals erred by not performing a *Teague* analysis when the issue was "properly raised by the state") (citing *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim.") (emphasis in original)).[4]

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4. Some of our sister circuits have addressed the question of whether *Ring* is retroactive as to cases governed by the AEDPA retroactivity rule, 28 U.S.C. § 2244(b)(2)(A). *See Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002) (holding that *Ring* was not retroactive under AEDPA, but not reaching the question of retroactivity under *Teague*); *see also Whitfield v. Bowersox*, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003) (declining to address whether death sentence contravened *Ring* because Supreme Court had not expressly made *Ring* retroactive under AEDPA); *Moore v. Kinney*, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (en banc) (same), *petition for cert. filed*, No. 02-10093 (Apr. 14, 2003). The question of whether a rule has retroactive application under AEDPA is a different inquiry from the question of whether *Teague* precludes retroactive application of a rule. Most importantly, AEDPA precludes retroactive application of a new rule of constitutional law unless "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2)(A). Because the Supreme Court has not addressed whether *Ring* should be applied retroactively, the analysis of the retroactively of *Ring* under AEPDA and *Teague* is necessarily distinct. As the Eighth Circuit noted in *Moore*, in analyzing whether *Ring* should be applied retroactively in a case governed by AEDPA, "[a]bsent an express pronouncement on retroactivity from the Supreme Court, the rule from *Ring* is not retroactive." 320 F.3d at 771 n. 3. To date, only the Eleventh

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In short, now that the Supreme Court has decided that Timothy Ring's capital murder conviction must be vacated because the judge was constitutionally disqualified from deciding whether Ring was eligible for the death penalty, the question is whether others who received the same constitutionally infirm sentence, including those who previously raised the identical issue,[5] are eligible for the same relief or whether they should remain subject to execution.

The question of whether a newly announced constitutional rule will apply retroactively on collateral review is a relatively recent inquiry in American jurisprudence. As Justice Holmes observed at the turn of the century, "[j]udicial decisions have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). At common law, the retroactivity question never arose because judges were believed to be discovering rules rather than declaring them. John C. Gray, *The Nature and Sources of the Law* 222 (1st ed. 1909). Even now, a presumption exists that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974). As the Supreme Court noted, "'[B]oth the common law and our own decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.' " *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (quoting *Robinson v. Neil*, 409 U.S. 505, 507 (1973)).

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4. (...continued)
Circuit has addressed the retroactivity of *Ring* under a *Teague* analysis. *See Turner v. Crosby*, ___ F.3d ___, No. 02-14941, 2003 WL 21739734 (11th Cir. July 29, 2003). In *Turner*, the Eleventh Circuit held that the petitioner's claim was procedurally barred, but held in the alternative that *Ring* was a procedural rule that should not be applied retroactively. *Id.* at *30-*37.

5. Most notably, Jeffery Walton, who raised the identical issue a decade ago, *see Walton v. Arizona*, 497 U.S. 639 (1990), but whose claim was rejected by the Supreme Court.

Following the Civil War and enactment of the Fourteenth Amendment, Congress expanded the scope of habeas corpus review to cover challenges brought by those in state custody, *see* Act of 1867, ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2241(c)(3)), prompting the Supreme Court to determine the proper scope of federal habeas jurisdiction. By 1953, the Supreme Court confirmed the cognizability of all federal constitutional claims filed by state prisoners. *Brown v. Allen*, 344 U.S. 443 (1953). The expanding scope of federal review, coupled with a significant increase in the filing of federal habeas petitions by state prisoners, provided the Supreme Court with the opportunity to review for the first time a number of alleged constitutional deprivations. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 21-22 (1956). Epochal constitutional criminal procedural protections were announced, and in their wake, a novel discussion arose as to whether a new constitutional rule of criminal procedure should be applied retroactively on direct or collateral review. This debate, a "product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field," *Mackey v. United States*, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part and dissenting in part), culminated in *Linkletter v. Walker*, 381 U.S. 618 (1965).

In *Linkletter*, a defendant was convicted based on evidence that was obtained during a warrantless search. A year after the defendant had exhausted his state appeals, the Supreme Court decided *Mapp v. Ohio*, 367 U.S. 643 (1961). Subsequently, the defendant filed a habeas petition arguing that *Mapp* required reversal of his conviction. The Supreme Court held that even though "the Constitution neither prohibits nor requires retrospective effect," *Linkletter*, 381 U.S. at 629, a constitutional rule of criminal procedure would not be retroactive unless, under a case-by-case analysis, three factors—the purpose of the new rule, reliance on prior doctrine, and the effect of retroactivity on the administration of justice—favor retroactive application of the rule. *Id.* at 636. The *Linkletter* rule applied to convictions pending on direct review as well as to final convictions challenged collaterally by a federal habeas petition. *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966).

The tripartite *Linkletter* test proved difficult to apply. Justice Harlan observed that it had fostered the creation of "an extraordinary collection of rules to govern the application of that principle." *Desist v. United States*, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting). He contended that the test produced inconsistent results, leading to different treatment for similarly-situated defendants. *See id.* Justice Harlan remained critical of the *Linkletter* test throughout a series of subsequent cases. *See, e.g., Mackey*, 401 U.S. at 675 (Harlan, J., concurring in part and dissenting in part); *Coleman v. Alabama*, 399 U.S. 1, 19 (1970) (Harlan, J., concurring in part and dissenting in part); *Von Cleef v. New Jersey*, 395 U.S. 814, 817 (1969) (Harlan, J., concurring in result); *Jenkins v. Delaware*, 395 U.S. 213, 222 (1969) (Harlan, J., dissenting); *Desist*, 394 U.S. at 256 (Harlan, J., dissenting). He argued instead that new constitutional rules ought to apply to all cases that were not final or that were pending on direct review. *Mackey*, 401 U.S. at 678-80. He also contended that new procedural (as opposed to substantive) due process rules ought not to apply retroactively on habeas review unless the claim implicated procedures "implicit in the concept of ordered liberty" or addressed rules that "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Id.* at 693-94 (internal quotation marks and citations omitted).

The analytical framework propounded by Justice Harlan ultimately proved persuasive. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Supreme Court adopted the first portion of Justice Harlan's analysis, noting that "[i]n Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. The Court therefore held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328.

[4] Two years later, the Court clarified its retroactivity jurisprudence in the habeas context in *Teague*. Importing Justice Harlan's analysis, *Teague* held that "[u]nless they fall within an

exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310.

[5] *Teague* also adopted Justice Harlan's two exceptions, providing that a new rule of criminal procedure would be retroactive if it "place[d] certain kinds of primary, private individual conduct beyond the criminal law-making authority to proscribe," or if the rule "require[d] the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Id.* at 311 (internal quotation marks omitted). The Supreme Court explained that the second exception had two components, formulated by combining aspects from Justice Harlan's dissents in *Desist* and *Mackey*. The Court thus limited the exception for "watershed rules of criminal procedure" to those procedures that both "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction," *id.* (quoting *Mackey*, 401 U.S. at 693) (internal quotation marks omitted; emphasis added in *Teague*), and "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313.

[6] Before applying these concepts to the instant case, it is important to set the appropriate analytic framework. The threshold question in a *Teague* analysis is whether the rule the petitioner seeks to apply is a substantive rule or a procedural rule, because "*Teague* by its terms only applies to procedural rules." *Bousley v. United States*, 523 U.S. 614, 620 (1998). If the rule is procedural, the court then conducts a three-step analysis to determine whether *Teague* bars its application. *See O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997). First, the reviewing court "must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes." *Caspari*, 510 U.S. at 390. Second, the court must survey "the legal landscape as it then existed," *Graham v. Collins*, 506 U.S. 461, 468 (1993), to determine whether existing precedent compelled a finding that the rule at issue "was required by the Constitution." *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997) (internal quotation marks and citations omitted). If existing precedent already required application of the rule, the *Teague* bar does not apply. If, by contrast, the procedure at issue is considered

a new rule for *Teague* purposes, the court must proceed to the third step and determine whether either of the two announced exceptions applies. *Teague*, 489 U.S. at 307 (plurality). The presumption against retroactivity is overcome only if the new rule prohibits "a certain category of punishment for a class of defendants because of their status or offense," *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 122 S. Ct. 2242 (2002), or presents a new "watershed rule of criminal procedure" that enhances accuracy and alters our understanding of bedrock procedural elements essential to the fairness of a particular conviction. *Teague*, 489 U.S. at 311 (plurality; citations omitted).

IV

We first consider the threshold *Teague* question, namely whether *Ring* announced a substantive rule or a procedural rule. *See Bousley*, 523 U.S. at 620. Unlike strictly procedural rules, "new rules of substantive criminal law are presumptively retroactive." *See, e.g., Santana-Madera v. United States*, 260 F.3d 133, 138 (2d Cir. 2001) (citing *United States v. Mandanici*, 205 F.3d 519, 525 (2d Cir. 2000)), *cert. denied*, 534 U.S. 1083 (2002). Thus, the *Teague* retroactivity bar does not apply if the rule *Ring* announced is substantive, rather than procedural, in nature. *Bousley*, 523 U.S. at 620.

As *Erie* doctrine demonstrates in the context of civil litigation, the distinction between "substantive" and "procedural" is not always easy to divine. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Hanna v. Plumer*, 380 U.S. 460, 471- 74 (1965); *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). The Supreme Court acknowledged this problem in a pre-*Teague* consideration of the difference between substantive and procedural criminal law, noting that "[w]e would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other." *Robinson*, 409 U.S. at 509.

However difficult it is to locate, though, "[t]his distinction between substance and procedure is an important one in the habeas

context." *Bousley*, 523 U.S. at 620. In giving shape to this important distinction, the Supreme Court has understood decisions of "criminal procedure" to be those decisions that implicate how the criminal trial process functions. Under *Teague*, only those decisions of "procedure" that insert into the criminal trial process a mechanism " 'without [which] the likelihood of an accurate conviction is seriously diminished' " apply retroactively. *Id.* (quoting *Teague*, 489 U.S. at 313).

[7] Decisions of "substantive criminal law," by contrast, are those that reach beyond issues of procedural function and address the meaning, scope, and application of substantive criminal statutes. *Id.* (noting that a Supreme Court holding is "substantive" for *Teague* purposes when it impacts the scope and application of a "substantive federal criminal statute"); *see also Davis v. United States*, 417 U.S. 333, 346 (1974) (including within the definition of "substantive" those decisions that remove primary conduct from the purview of criminal punishment). Thus, for *Teague* purposes, a new rule is one of "procedure" if it impacts the operation of the criminal trial process, and a new rule is one of "substance" if it alters the scope or modifies the applicability of a substantive criminal statute. *Bousley*, 523 U.S. at 620.

In *Bousley*, the Supreme Court applied this substantive procedural logic, rejecting the government's *Teague*-based non-retroactivity argument because the case called for a construction of a federal statute. *Teague*, Chief Justice Rehnquist explained, "is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." *Id.* For the same reason, we recently determined that the rule announced in *Richardson v. United States*, 526 U.S. 813, 815 (1999), requiring jury unanimity on individual violations alleged as part of a continuing criminal enterprise, is substantive, not procedural, under *Teague*. *See United States v.*

Montalvo, 331 F.3d 1052 (9th Cir. 2003). All of our sister circuits that have considered the question agree with this categorization.[6]

"[S]ignificant" to both this court's and our sister circuits' understanding of *Richardson*'s rule as substantive is the fact that *Richardson* "was 'decid[ing] the meaning of a criminal statute.' " *Montalvo*, 331 F.3d at 1056 (citation omitted; alteration in original); *see also Murr*, 200 F.3d at 906. Explaining or redefining elements of an offense, we observed in *Montalvo*, constitutes a decision of substantive criminal law for *Teague* purposes. 331 F.3d at 1055-56; *see also United States v. Dashney*, 52 F.3d 298, 299 (10th Cir. 1995). Thus, because *Richardson* expressly "analyz[ed] what constitutes 'elements' as opposed to brute facts or 'means' " of an offense, the rule *Richardson* announced was substantive for *Teague* purposes. *Montalvo*, 331 F.3d at 1056.[7]

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6. *See, e.g., United States v. Barajas-Dias*, 313 F.3d 1242, 1245 (10th Cir. 2002); *Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 944 (2003); *Santana-Madera*, 260 F.3d at 138-39; *Lopez v. United States*, 248 F.3d 427, 431-32 (5th Cir.), *cert. denied*, 534 U.S. 898 (2001); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000); *Murr v. United States*, 200 F.3d 895, 905-06 (6th Cir. 2000).

7. In contrast, our opinion in *United States v. Buckland*, 289 F.3d 558 (9th Cir.) (en banc), *cert. denied*, 122 S. Ct. 2314 (2002), illustrates how a decision with some substantive implications may be considered a procedural rule for *Teague* purposes. In *Buckland*, we assessed the impact of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), on "type and quantity" findings under 21 U.S.C. § 841(b). 289 F.3d at 562-63. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Rejecting the contention that *Apprendi* rendered § 841 unconstitutional, *id.* at 564, we concluded that *Apprendi* did not alter, restructure, or redefine as a matter of New Jersey law the substantive elements of the underlying offense there at issue, nor did it create or resurrect a separate substantive offense. Further, we noted, *Apprendi* did not demand that we do so when assessing "type and quantity" evidence under § 841. *Id.* at 565, 568. Rather, *Apprendi* imposed a particular procedure through which the existing " 'elements' in § 841[ ]" must be established, viz., through submission to the jury and proof beyond a reasonable doubt. *Id.* Accordingly, we determined in *Buckland* that the impact of *Apprendi* on "type and quantity" under § 841 was one of a

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In the habeas context in particular, as Chief Judge Becker has observed, there are those cases that do "not fall neatly under either the substantive or procedural doctrinal category." *United States v. Woods*, 986 F.2d 669, 677 (3d Cir. 1993). In such cases, "the best approach is to recognize that [the case at issue] is neither entirely substantive nor procedural." *Id.* at 678. *Ring* is such a decision. In one sense, *Ring*—like *Apprendi*—announced a procedural rule: *Ring* mandated that a jury, rather than a judge, must find aggravating circumstances in a capital case. *Ring*'s holding thus addressed, at least in part, the procedure by which any capital trial must be conducted. *See Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002) (assessing the operation of *Ring* on Oklahoma law).[8]

[8] In the context of substantive Arizona criminal law, however, *Ring* did more than answer a strictly procedural question. Thus, *Ring* is unlike *Apprendi*, in which the Supreme Court expressly declared that its decision had no impact on substantive criminal law, noting that "[t]he substantive basis for New Jersey's enhancement is not at issue." 530 U.S. at 475. By important contrast, the substantive basis for Arizona's capital sentencing scheme was precisely at issue in *Ring*.[9]

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7. (...continued)
procedural—not substantive—ilk. *Id.* at 563 (noting that *Apprendi* was retroactive nevertheless because the case arose through direct review) (citing *Griffith*, 479 U.S. at 328).

8. The Eleventh Circuit did not address the question of whether *Ring* had substantive impact on Florida law in its consideration of whether *Teague* barred the retroactive application of *Ring*. *See Turner*, 2003 WL 2173934, *33-*37. Thus, our consideration in this respect is different from the issue addressed by the Eleventh Circuit. To the extent that the Eleventh Circuit relied on a pure analogy to *Apprendi* in its *Ring* analysis, we respectfully disagree with its conclusions.

9. In its assessment of the "linkage" between *Ring* and *Apprendi*, the dissent contends that we hitch our distinction of *Apprendi* solely to the putative inapplicability of harmless-error analysis in the *Ring* context. However, the crux of the analysis is different. What "distance[s]" *Ring* from *Apprendi* is not simply a harmless error consequence. Rather, the very focus of the Supreme Court's analysis in the two cases proves *Ring* and *Apprendi* distinct: *Apprendi* expressly refused to

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Ring rendered Arizona's substantive capital murder statute unconstitutional. More than a procedural holding, *Ring* effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment. That is, as applied to the particular Arizona murder statute at issue here, *Ring*'s holding was "substantive" for *Teague* purposes. *See Bousley*, 523 U.S. at 620 (noting that a Supreme Court holding is "substantive" when it impacts the scope and application of a "substantive federal criminal statute"). A careful analysis of the structure and history of the relevant Arizona statutes, coupled with a close examination of the underlying rationale of *Ring* and the Supreme Court's related jurisprudence, reveals that *Ring* is, as to Arizona, a "substantive" decision, even if its form is partially procedural.

In 1901, the Territory of Arizona enacted its first death penalty statute, leaving capital sentencing to the discretion of the jury except where the defendant entered a plea of guilty. *See* Ariz. Territorial Rev. Stat., tit. 8, § 174 (1901). In relevant part, the 1901 Arizona statute provided that

> [e]very person guilty of murder in the first degree shall suffer death or imprisonment . . . for life, at the discretion of the jury trying the same, or, upon the plea of guilty, the court shall determine the same.

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9. (...continued)
reach "[t]he substantive basis" of law at issue in that case, *see* 530 U.S. at 475; *Ring*, conversely, did reach the relevant substantive basis. *See* 536 U.S. at 589-90. In eliding this aspect of *Ring*'s analysis, the dissent both overstates *Ring*'s affinity to *Apprendi* and mischaracterizes the first step of our "syllogism." *See* Dissent at 12789. The "substantive" aspect of *Ring* rests on more than the creation of a separate substantive offense. It rests, in addition, on the Supreme Court's wholesale invalidation of Arizona's capital sentencing scheme. *See Bousley*, 523 U.S. at 620. This kind of consideration of the "substantive basis" of the law was wholly absent from the Supreme Court's analysis and decision in *Apprendi*.

Id.

In 1916, Arizona abolished the death penalty by state initiative, *see* Act of Dec. 8, 1916, 1917 Ariz. Session Laws, Initiative and Referendum Measures, at 4-5, but the 1901 death penalty statute was restored through similar political means in 1918. *See* Act of Dec. 5, 1918, 1919 Ariz. Sess. Laws, Initiative and Referendum Measures, at 18.

Following the 1918 initiative, Arizona's death penalty scheme remained largely unchanged for more than 50 years. From 1919 until 1972, Arizona committed the decision as to whether to impose the penalty of death following a criminal trial to the complete discretion of the jury. *See Hernandez v. State*, 32 P.2d 18, 20-21 (Ariz. 1934) ("It is clear from this that the question of punishment in first-degree murder cases is wholly within the jury's discretion and that the court has no duty in connection therewith other than to advise it that it must determine which of the penalties—death or life imprisonment—shall be imposed upon the defendant if it finds him guilty of that offense.").

In 1972, however, the Supreme Court held that death penalty statutes vesting complete discretion in the judge or in the jury, like Arizona's, were unconstitutional. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The impact of *Furman* particularly is instructive in this context. There was no doubt, importantly, that *Furman* had retroactive effect. *See Moore v. Illinois*, 408 U.S. 786, 800 (1972) (applying *Furman* on habeas review); *United States v. Johnson*, 457 U.S. 537, 550 (1982) (discussing same). Following the dictates of *Furman* and *Stewart v. Massachusetts*, 408 U.S. 845 (1972), the Supreme Court vacated a number of Arizona death sentences, both on direct appeal and on collateral habeas review. *See, e.g., Alford v. Eyman*, 408 U.S. 939 (1972) (habeas); *Kruchten v. Eyman*, 408 U.S. 934 (1972) (habeas); *Sims v. Eyman*, 408 U.S. 934 (1972) (habeas); *Gause v. Arizona*, 409 U.S. 815 (1972) (direct review). In light of this Supreme Court precedent, the Arizona Supreme Court declared the Arizona death penalty statute to be unconstitutional under the Eighth and Fourteenth Amendments. *See State v. Endreson*, 506 P.2d 248, 254

(Ariz. 1973). The Arizona court acknowledged, after examining the structure of the relevant Arizona criminal statutes, that the Supreme Court, through *Furman*, had "abolished 'capital offenses' in Arizona" substantively. *In re Tarr*, 508 P.2d 728, 729 (Ariz. 1973). In short, the effect of *Furman* in declaring Arizona's capital murder statute unconstitutional was unquestionably substantive.

A year later, in 1973, Arizona enacted a new "capital offense" statute. This new statute established sentencing standards in capital cases and provided for sentencing by judge, rather than by jury. *See* Act of May 14, 1973, ch. 138, § 5, 1973 Ariz. Sess. Laws 966, 968-70. The 1973 statute identified six aggravating circumstances and four mitigating circumstances for sentencing courts to consider and required the court to impose a death sentence only if it found (1) one or more aggravating circumstances to exist and (2) no countervailing mitigating circumstances "sufficiently substantial to call for leniency." *Id.* In *State v. Richmond*, 560 P.2d 41 (Ariz. 1976), the Arizona Supreme Court upheld the constitutionality of the 1973 death penalty statute.

But the Supreme Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Bell v. Ohio*, 438 U.S. 637 (1978), which declared unconstitutional death penalty statutes that restricted the right of the defendant to show mitigating circumstances in capital cases raised anew questions of whether the 1973 Arizona statute could pass constitutional muster. To this end, in *Bishop v. Arizona*, 439 U.S. 810 (1978), the Supreme Court vacated and remanded an Arizona death sentence for reconsideration in light of *Lockett*. Following this remand, the Arizona Supreme Court held that Arizona's 1973 death penalty statute was unconstitutional insofar as it precluded the defendant from proving non-statutory mitigating circumstances. *State v. Watson*, 586 P.2d 1253, 1257 (Ariz. 1978).

Soon thereafter, in 1979, the Arizona legislature amended the State's death penalty statute to conform to *Lockett* by defining as relevant mitigating circumstances "any factors offered by the state or the defendant which are relevant in determining whether to impose a sentence less than death." These factors included, but were not limited

to, the factors enumerated in the statute itself. Act of May 1, 1979, ch. 144, § 1, 1979 Ariz. Sess. Laws 449, at 450-51. The legislature added various aggravating and mitigating factors to the terms of the statute in 1977, 1978, 1984, and 1985, but, during this period, the essential structure of Arizona's death penalty statute remained the same. In 1983, the United States Supreme Court confirmed that, to be constitutional under the Eighth Amendment, a state's capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Finding at least one aggravating factor "narrows the class of persons eligible for the death penalty." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). Arizona's substantive revisions to its capital murder statute were designed to pass these constitutional requirements. Thus, as a result of *Furman* and its progeny, the crime of capital murder in Arizona was substantively altered. As Justice Thomas has observed: "[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes." *Apprendi*, 530 U.S. at 522-23 (Thomas, J., concurring).

In 1988, we considered a defendant's Sixth Amendment challenge to the Arizona death penalty statute. *See Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc). In *Adamson*, we noted that, "[u]nder Arizona's revised code, all murder is not capital murder," *id.* at 1025, and that, under the code, Arizona had in effect defined capital murder to be a substantive offense separate from non-capital murder. *Id.* at 1026; *see id.* at 1025 ("[W]e recognize that the mere use of labels . . . to compartmentalize the functions of judge and jury[ ] does not negate the very real possibility that what are called 'sentencing' decisions may in fact usurp jury factfinding responsibilities."). We concluded in *Adamson* that, because the Arizona statute required the finding of aggravating factors before the death penalty could be imposed, the Arizona statute made these aggravating factors elements of the "distinctive offense of *capital* murder," not mere sentencing factors relevant to increasing the punishment for a lesser offense. *Id.* at

1026-27 (emphasis in original). Accordingly, we held that "Arizona's aggravating circumstances function as elements of the crime of capital murder requiring a jury's determination." *Id.* at 1027. Based on this understanding of Arizona law, we found Arizona's identification and treatment of the "elements of the crime of capital murder as sentencing factors for determination by a judge," rather than as offense elements to be determined by the jury, to be "impermissibl[e]" and "in violation of the Sixth Amendment." *Id.* at 1029.

In *Walton*, the Supreme Court abrogated our decision in *Adamson*. In pertinent part, *Walton* held that aggravating circumstances under Arizona law were only "sentencing considerations," not "elements of the offense" of capital murder. *Id.* at 648 (citing *Poland v. Arizona*, 476 U.S. 147, 156 (1986)). *But cf. id.* at 710-14 (Stevens, J., dissenting) (suggesting that, "under Arizona law," the aggravating factors are "elements of a capital crime [ ] [that] must be determined by a jury") (citations omitted). Thus, *Walton* refuted our decision in *Adamson* and concluded "that the Arizona capital sentencing scheme does not violate the Sixth Amendment." *Id.* at 649.

Ring expressly overruled *Walton* in relevant part. 536 U.S. at 589. In considering the same statutory scheme at issue in *Walton* and *Adamson*, *Ring* squarely rejected *Walton*'s interpretation of Arizona law, holding that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.' " *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

In so doing, *Ring* restored, as a matter of substantive law, the pre-*Walton* structure of capital murder law in Arizona; and, in so doing, *Ring* confirmed what we stated in *Adamson*: Under substantive Arizona law, there is a distinct offense of capital murder, and the aggravating circumstances that must be proven to a jury in order to impose a death sentence are elements of that distinct capital offense. 865 F.2d at 1025-28; *see also Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 739 (2003) ("Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes

an element, and must be found by a jury beyond a reasonable doubt.") (opinion of Scalia, J.). That is, when *Ring* displaced *Walton*, the effect was to declare Arizona's understanding and treatment of the separate crime of capital murder, as Arizona defined it, unconstitutional. And when *Ring* overruled *Walton*, repositioning Arizona's aggravating factors as elements of the separate offense of capital murder and reshaping the structure of Arizona murder law, it necessarily altered both the substance of the offense of capital murder in Arizona and the substance of Arizona murder law more generally. *Cf. Jones v. United States*, 526 U.S. 227, 229 (1999) (holding that the federal carjacking statute established three separate offenses rather than a single crime with a choice of three maximum penalties). In response to *Ring*, the Arizona Supreme Court vacated all death sentences in cases pending on direct appeal, *see State v. Smith*, 50 P.3d 825, 831 (Ariz. 2002), and the Arizona legislature once more changed the substantive law pertaining to capital punishment—this time providing for jury sentencing in capital cases. *See* Act of Apr. 27, 2001, ch. 260, § 1, 2001 Ariz. Sess. Laws 1334, 1334.

Ring's understanding of capital murder as an offense both greater than and distinct from other murder crimes is neither unusual among the various States nor unrecognized by the Supreme Court. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 307 n.1 (2002) (noting that the two defendants were both "indicted for capital murder" but "[t]he prosecution ultimately permitted [one] to plead guilty to first-degree murder in exchange for [ ] testimony against" the other); *Beck v. Alabama*, 447 U.S. 625, 628 (1980) (noting that Alabama law treats "[f]elony murder [as] [ ] a lesser included offense of the capital crime of robbery-intentional killing").

In assessing the operation of *Apprendi*, in fact, Justice Scalia recently explained that "the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.' " *Sattazahn*, 123 S. Ct. at 739. Noting that there was "no principled reason to distinguish . . . what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double

Jeopardy Clause," Justice Scalia concluded "that 'murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter*." *Id.* at 739-40 (also citing *Ring* for the proposition that "'first-degree murder' . . . is properly understood to be a lesser included offense of 'first-degree murder plus aggravating circumstance(s)' "); *see also Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime . . . . The aggravating fact is an element of the aggravated crime.").

Ring compelled Arizona to reorder its substantive murder law in order to recognize this two-offense structure. With regard to Arizona murder law, then, *Ring* did more than announce a procedural rule vis-a-vis whether a judge or a jury is to decide if elements of a particular offense have been proven satisfactorily. *Ring* reintroduced "capital murder" as a separate substantive offense under Arizona law, redefining, in the process, what the substantive elements of this "separate offense" of capital murder are. *See Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting) (observing that the Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense" and only to the extent it explicitly cross-references the separate Arizona statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty). In this sense, *Ring* had an inescapably substantive impact in Arizona for *Teague* purposes.[10]

[9] To be sure, states must ensure that their capital sentencing schemes comply with the minimal procedural requirements set forth in *Ring*. Still, in the context of Arizona capital murder law, *Ring*'s rule is not limited to procedure. *Ring* did, as to Arizona, announce a

10. Justice O'Connor recognized this in her dissent in *Ring*, noting that "[t]he Court effectively declares five States' capital sentencing schemes unconstitutional." *Ring*, 536 U.S. at 620 (O'Connor, J., dissenting) (referencing Arizona, Idaho, Montana, Colorado, and Nebraska).

substantive rule: It "decide[d] the meaning of a criminal statute," *see Bousley*, 523 U.S. at 620, and it did so in a manner that both redefined the separate substantive offense of "capital murder" in Arizona and reinserted the distinction between murder and capital murder into Arizona's substantive criminal law structure. Under the Supreme Court's articulation of "substantive" decisions in *Bousley*, then, *Ring* announced a "substantive" rule, *Bousley*, 523 U.S. at 620, for it "altered the meaning of [Arizona's] substantive criminal law." *Santana-Madera*, 260 F.3d at 139; *cf. Cannon*, 297 F.3d at 994 (holding *Ring's* rule to be procedural in a different capital murder context). When a decision affects the substantive elements of an offense, or how an offense is defined, it is necessarily a decision of substantive law. *Dashney*, 52 F.3d at 299. And because *Ring* is a "substantive" decision with regard to the meaning, structure, and ambit of the relevant provisions of Arizona's criminal law, *Teague* does not bar retroactive application of *Ring* to cases decided under those Arizona provisions, regardless of whether those cases are considered on direct or collateral review.

The Arizona Supreme Court considered this question in *State v. Towery*, 64 P.3d 828 (Ariz. 2003), and concluded that *Ring* was not a substantive decision. *Id.* at 833. More recently, the Arizona Supreme Court considered related issues in *State v. Ring*, 65 P.3d 915 (Ariz. 2003) ("*Ring II*"). In each case, the Arizona Supreme Court's conclusion was founded on an interpretation of federal law, namely a construction of *Teague* and *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam), in *Towery* and an analysis of the Ex Post Facto Clause in *Ring II*. Because the decisions in *Towery* and *Ring II* rest on federal law, and not state law, they do not bind us. *Moore v. Sims*, 442 U.S. 415, 428 (1979) (reiterating the familiar maxim that state courts possess final interpretive "authority" only regarding "laws of the state") (citing *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941), and *Gilchrist v. Interborough Co.*, 279 U.S. 159 (1929)); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954) (noting that a federal court "decide[s] for itself facts or constructions upon which federal constitutional issues rest"); *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917) (noting that federal courts determine federal questions independently); *see also Haynes v. Washington*, 373 U.S. 503, 515-16

(1963); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984); *Calkins v. Graham*, 667 F.2d 1292, 1295 n.1 (9th Cir. 1982). This is particularly true in the Eighth Amendment context. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Nonetheless, the two opinions are worthy of analysis.

In *Towery*, the Arizona Supreme Court correctly concluded that *Ring*'s rule is partially procedural under *Teague*. For the reasons previously stated, however, we respectfully disagree with *Towery*'s conclusion that *Ring*'s rule is entirely procedural. *Ring*'s invalidation of Arizona's capital murder statute under the United States Constitution did more than alter "who decides." *Towery*, 64 P.3d at 833. It restructured Arizona law and it redefined, as a substantive matter, how that law operates. It is, thus, incorrect to conclude that the repositioning of aggravating factors as elements of a separate offense did not constitute a "substantive" rule. Such a construction ignores that *Ring*'s restructuring of the elements of the separate offense of capital murder is, at the very least, a determination of the "meaning of a criminal statute," which is precisely the kind of decision that *Towery* itself recognizes as "substantive." *Id.* at 832. Of equal importance is the fact that *Ring*'s revival of the pre-*Walton* two-offense structure of Arizona murder law does "address the criminal significance of certain facts," another kind of decision that *Towery* recognizes as "substantive." *Id.*

The Arizona Supreme Court's analogy to *Apprendi* in *Towery* is flawed as well. As noted above, in *Apprendi*, "[t]he substantive basis for New Jersey's enhancement [was] not at issue." 530 U.S. at 475. In *Ring*, conversely, the substantive basis of Arizona's capital murder regime was at issue, so much so that *Ring* restored as a matter of substantive law the pre-*Walton* capital murder paradigm in Arizona. As we held in *Adamson*, this regime had defined capital murder as a substantive offense separate from non-capital murder. 865 F.2d at 1026. This distinction was required to satisfy the Eighth Amendment's requirement that a capital sentencing scheme "genuinely narrow the class of persons eligible for the death penalty." *Zant*, 462 U.S. at 877. *Ring* further required the Arizona legislature to amend the Arizona murder statute to conform to the requirements of the United States Constitution.

The Arizona Supreme Court's Ex Post Facto analysis in *Ring II* likewise does not alter our analysis. In *Ring II*, the Arizona Supreme Court concluded that applying Arizona's new sentencing statutes to previously convicted defendants did not violate the federal or state prohibitions against Ex Post Facto application of laws. *Ring II*, 65 P.3d at 928. To reach this conclusion, *Ring II* relied on three decisions: the Supreme Court's decisions in *Dobbert v. Florida*, 432 U.S. 282 (1977), and *Collins v. Youngblood*, 497 U.S. 37 (1990), and the Arizona Supreme Court's decision in *State v. Correll*, 715 P.2d 721 (Ariz. 1986), *rev'd in part on other grounds by Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998). *Ring II*, 65 P.3d at 926-28. Like *Dobbert*, *Ring II* concluded, "the statutory change between the two sentencing methods was 'clearly procedural' " in that this legislative enactment merely addressed the "who decides" question. *Id.* at 927 (quoting *Dobbert*, 432 U.S. at 293-94).

In contrast to the post-*Ring* legislative changes at issue in *Ring II*, the Supreme Court's *Ring* decision itself was not merely procedural. *Ring* declared a portion of Arizona's prior law unconstitutional, demanded a redefinition of the meaning of that criminal statute, and prompted the legislative response at issue in *Ring II*, not by announcing a purely procedural rule, but by announcing, as a matter of substantive law, that Arizona's understanding and treatment of the separate crime of capital murder was unconstitutional. This is exactly the kind of decision that is "substantive" under *Bousley*, 523 U.S. at 620. Indeed, the very case law on which *Ring II* relies understands precisely this kind of rule to be of a "substantive nature." *See Collins*, 497 U.S. at 51 (noting that a rule is substantive in the Ex Post Facto context where it implicates "the definition of crimes, defenses, or punishments"); *Correll*, 715 P.2d at 735 (holding that changes relating to aggravating circumstances constituted substantive changes to the offense of capital murder).

Teague requires a different analytical lens from the one used by the Arizona Supreme Court in *Ring II*. We do not necessarily assess whether the action of the Arizona legislature, in response to *Ring*, effected a "substantive" change to Arizona law; rather, we examine whether the rule announced by the Supreme Court in *Ring* was a "substantive" one for *Teague* purposes. Analyzed under *Teague*, the rule announced by the Supreme Court in *Ring*, with its restructuring of Arizona murder law and its redefinition of the separate crime of capital murder, is necessarily a "substantive" rule. *See Bousley*, 523 U.S. at 620. Thus, *Teague* does not bar its application in this case.

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V

[10] In addition to *Ring*'s substantive effect on Arizona law, a full *Teague* analysis of the unique procedural aspects of *Ring* provides an independent basis upon which to apply *Ring* retroactively to cases on collateral review.

A

[11] In undertaking a *Teague* procedural analysis, we first must ascertain the date that Summerlin's conviction became final. *Caspari*, 510 U.S. at 390. Here, the Arizona Supreme Court denied rehearing of its opinion affirming his conviction and death sentence in 1984, *see State v. Summerlin*, 675 P.2d at 686, and Summerlin did not file a petition for a writ of certiorari with the Supreme Court. The relevant date thus is 1984. *See Lambrix*, 520 U.S. at 527 (noting that the defendant's conviction became final when his time for filing a petition for a writ of certiorari expired).

Next, we "survey the legal landscape" as it existed in 1984 to determine whether the result in *Ring* was dictated by then existing precedent. *Graham*, 506 U.S. at 468. Such examination is not limited to Supreme Court decisions. *Williams v. Taylor*, 529 U.S. 362, 381 (2000). Summerlin's conviction became final before the Supreme Court

had decided *Ring*, which overturned *Walton*, which in turn abrogated our decision in *Adamson*.

Summerlin contends that *Ring* does not announce a new rule because *Adamson* had found that Arizona's sentencing scheme denied defendants the "right to a jury decision on the elements of the crime in violation of the Sixth and Fourteenth Amendments." 865 F.2d at 1023. Regardless of the merits of such argument for convictions made final in 1988, the operative time period is 1984. At that time, Summerlin in fact raised this exact challenge to the Arizona Supreme Court, which soundly rejected it. *State v. Summerlin*, 675 P.2d at 695. The state supreme court reasoned that *Proffitt v. Florida*, 428 U.S. 242 (1976), foreclosed such a challenge for two reasons. First, *Proffitt* found that jury sentencing in the capital context never has been held to be "constitutionally required," and second, the United States Supreme Court speculated that judicial sentencing "should lead, if anything, to even greater consistency" in capital punishment. *State v. Summerlin*, 675 P.2d at 695 (quoting *Proffitt*, 428 U.S. at 252) (internal quotation marks omitted).

[12] "[T]he *Teague* doctrine 'validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.' " *O'Dell*, 521 U.S. at 156 (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)). Further, "there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision," *Graham*, 506 U.S. at 467, which *Ring* indisputably did. *Ring*, 536 U.S. at 608-609.

[13] We therefore cannot say that a state court in 1984 "would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell*, 521 U.S. at 156. Summerlin's argument fails because there is no doubt that *Ring* announced a new rule as that term is construed for *Teague* purposes. We must then proceed to the third stage of analysis, namely whether either of *Teague*'s two exceptions apply.

B

[14] The first *Teague* exception examines whether certain primary conduct has been decriminalized or whether certain classes of individuals are immunized from specified forms of punishment by the newly announced rule. *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (permitting retroactive application of a new rule "if the rule places a class of private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution") (internal citations, quotation marks, and modifications omitted). Because *Ring* did not "decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons," *Graham*, 506 U.S. at 477 (quoting *Saffle*, 494 U.S. at 495), the first exception is inapplicable to the instant ruling.

C

To fall within the second *Teague* exception, a new rule must: (1) seriously enhance the accuracy of the proceeding and (2) alter our understanding of bedrock procedural elements essential to the fairness of the proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990).

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In considering *Ring's* effect on the accuracy of the proceeding, it is important to note that this is a capital case. "Where the State imposes the death penalty for a particular crime, . . . the Eighth Amendment imposes special limitations on that process." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991). Under *Teague*, the focus on the "accuracy of the . . . proceeding" generally is understood to mean "accurac[y] [in] determin[ing] . . . innocence or guilt." *Graham*, 506 U.S. at 478 (internal quotation marks omitted). However, as the United States Supreme Court has stated, penalty-phase proceedings also "'have the hallmarks of the trial on guilt or innocence.'" *Sattazahn*, 123 S. Ct. at 737 (quoting *Bullington v. Missouri*, 451 U.S. 430, 439 (1981)). For this reason, a verdict rejecting the imposition of the death penalty prohibits a subsequent capital prosecution. *See id.; Bullington*,

415 U.S. at 439. This is consistent with the substantive consideration of capital murder as a crime distinct from ordinary murder. *Sattazahn*, 123 S. Ct. at 739. Accordingly, in the capital context, *Teague*'s reference to "accuracy in the proceedings" contemplates the ultimate verdict in both the conviction and penalty phases.

[15] The Supreme Court has long recognized that, in the capital context, "the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).[11] Indeed, as Justice Kennedy has observed, "[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense." *Sawyer*, 497 U.S. at 243. Reformation of capital sentencing procedures has been presumed to meet the first requirement that the new rule substantially enhance the accuracy of the legal proceeding at issue. *See id.* (but emphasizing that the second "bedrock procedural element" requirement also must be met). Thus, on its face, the procedure at issue in *Ring* is sufficient to meet the first component of *Teague's* second exception. Moreover, upon close examination, the actual impact of procedural change dictated by *Ring* provides further support for finding that the *Ring* rule enhances the accuracy of the determination of capital murder in Arizona.

The Supreme Court recently observed that, in light of the past thirty years of actual experience, "the superiority of judicial factfinding in capital cases is far from evident." *Ring*, 536 U.S. at 607. An examination of the procedure at issue makes apparent several reasons why fact-finding by a jury, rather than by a judge, is more likely to heighten the accuracy of capital sentencing proceedings in Arizona.

First, Arizona penalty-phase presentations to judges bear much greater resemblance to traditional non-capital sentencing hearings than to proceedings required to " 'have the hallmarks of the trial on guilt or

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11. This concern is not merely theoretical. *See* James S. Liebman, et al., *Broken System: Error Rates in Capital Cases, 1973-1995* at 5 (2000) *available at* <http://justice.policy.net/jpreport/>.

innocence.' " *Sattazahn*, 123 S. Ct. at 737 (quoting *Bullington*, 451 U.S. at 439). Penalty phases in jury trials are characterized by the orderly presentation of evidence and argument. In contrast, penalty-phase presentations to Arizona judges are capable of being extremely truncated affairs with heavy reliance on presentence reports and sentencing memoranda, and with formal court proceedings frequently limited to a brief argument by counsel. Whether this has been the product of the participants treating penalty-phase trials as mere sentencing hearings, or whether this is the natural product of the shorthand communication typical of non-capital sentencing proceedings is unknown. However, the results are clear. A quick survey of recent Ninth Circuit cases from Arizona illustrates the point. *See, e.g., Beaty v. Stewart*, 303 F.3d 975, 988 (9th Cir. 2002) (no mitigating evidence presented), *petition for cert. filed*, No. 02-1611, 71 U.S.L.W. 3530 (Jan. 23, 2003); *Lambright v. Stewart*, 241 F.3d 1201, 1202-03 (9th Cir. 2001) (no argument presented, and mitigating evidence consumed three transcript pages), *cert. denied*, 534 U.S. 1118 (2002); *Smith v. Stewart*, 189 F.3d 1004, 1010 (9th Cir. 1999) (attorney asked court for advice on what legal and evidentiary considerations could be relevant in establishing mitigation; only brief argument on day of sentencing); *Correll v. Stewart*, 137 F.3d 1404, 1410 (9th Cir. 1998) (no defense witnesses presented; only brief argument); *Clabourne*, 64 F.3d at 1384 (no witnesses presented; only one mitigating circumstance argued)

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In addition, because penalty-phase presentations to judges tend to resemble non-capital sentencing proceedings, the sentencing judge receives an inordinate amount of inadmissible evidence, which he or she is expected to ignore. Indeed, the focus of penalty-phase proceedings before judges has been the presentence report prepared by the probation officer, rather than evidence formally presented and tested at trial.[12] Although presentence reports are an extremely useful

12. The capital murder statute effective at the time contemplated the consideration of presentence reports by capital sentencing judges. Ariz. Rev. Stat. § 13-703(C) (1998) (repealed Laws 1999, Ch. 104, § 1). Consideration of presentence reports was routine. *See, e.g., State v. Bocharski*, 22 P.3d 43, 56 (Ariz. 2001); *State* (continued...)

sentencing tool, by their nature the information they contain is "generally hearsay, even remote hearsay at the second and third remove." *United States v. Frushon*, 10 F.3d 663, 666 (9th Cir. 1993) (quoting *United States v. Fine*, 975 F.2d 596, 603 (9th Cir. 1992)). As a result, presentence reports are generally inadmissible at trial to prove any of the hearsay reports they contain. *See United States v. Matta-Ballesteros*, 71 F.3d 754, 767 (9th Cir. 1995), *as amended by* 98 F.3d 1100 (9th Cir. 1996). Because they are not subject to evidentiary standards, presentence reports may also contain factual errors.[13] In Arizona capital cases, presentence reports have also frequently contained inadmissible victim impact statements, including sentencing recommendations from the victim's family.[14]

In addition, capital sentencing judges in Arizona have often received letters directly from the victim's family and friends expressing

12. (...continued)
v. Mann, 934 P.2d 784, 792 (Ariz. 1997); *State v. Kemp*, 912 P.2d 1281, 1295 (Ariz. 1996); *State v. Gulbrandson*, 906 P.2d 579, 599 (1995); *State v. Stokley*, 898 P.2d 454, 468 (Ariz. 1995); *State v. Brewer*, 826 P.2d 783, 801 (Ariz. 1992); *see also infra* note 12.

13. During the period relevant to this case, a study commissioned by the Federal Judicial Center noted that "[t]he principal problem inherent in the use of the presentence report is its potential for introducing inaccurate or misleading information into the sentencing decision." Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615, 1628 (1980). The study cited an Arizona state case as a primary example in which an inaccurate presentence report caused "defendants [to be] incarcerated for a significantly longer period than they should have been because of untrue statements in the presentence report." *Id.* at 1628-29 (citing *State v. Killian*, 370 P.2d 287, 290 (Ariz. 1962)).

14. *See, e.g., State v. Sansing*, 26 P.3d 1118, 1129 (Ariz. 2001), *cert. granted and judgment vacated by Sansing v. Arizona*, 536 U.S. 954 (2002); *Bocharski*, 22 P.3d at 56; *State v. Soto-Fong*, 928 P.2d 610, 633 (Ariz. 1996); *State v. Spears*, 908 P.2d 1062, 1077 (Ariz. 1996); *Gulbrandson*, 906 P.2d at 599; *State v. Williams*, 904 P.2d 437, 454 (Ariz. 1995); *State v. Bolton*, 896 P.2d 830 (Ariz. 1995); *State v. Apelt*, 861 P.2d 634, 644 (Ariz. 1993); *Brewer*, 826 P.2d at 800; *State v. Greenway*, 823 P.2d 22, 29 (Ariz. 1992); *State v. Amaya-Ruiz*, 800 P.2d 1260, 1287 (Ariz. 1990).

their opinions about sentencing, prompting the Arizona Supreme Court to explain that: "[w]e have no way of preventing members of the community from writing judges." *Mann*, 934 P.2d at 792.[15] The net result, prior to *Ring*, was a capital sentencing system that allowed a large amount of inadmissible evidence to be submitted to capital sentencing judges that could not be considered by a penalty-phase jury.

The penalty-phase presentation in the instant case was typical of pre-*Ring* Arizona capital sentencing cases and illustrates both problems. The actual penalty-phase proceeding was exceedingly truncated and bore more resemblance to traditional non-capital judge sentencing than a trial. Before hearing any presentation by the parties, Judge Marquardt received a presentence report prepared by a probation officer who did not testify during the penalty phase. It contained numerous sentencing recommendations from the victim's family and friends, police officers, and others. Attached to the presentence report were a large number of letters from members of the community expressing their opinions, including a petition with over 500 signatories. The presentence report also contained the probation

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15. Of course, the proper admission of victim impact evidence by itself does not necessarily violate the Eighth Amendment. *Payne*, 501 U.S. at 827. However, the Supreme Court has held that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Id.* at 830 n.2 (citing *Booth v. Maryland*, 482 U.S. 496 (1987)). In addition, if the material "is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825 (citing *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)). The Arizona Supreme Court has acknowledged that a defendant's constitutional rights would be violated if a capital sentencing jury received sentencing recommendations from the victim's family and friends, but has allowed capital sentencing judges to receive the information on the basis that judges will disregard "the irrelevant, inflammatory, and emotional factors." *Bolton*, 896 P.2d at 856.

officer's opinion as to the heinous nature of the crime and expressed her opinion as to the sentence that the judge should impose.

In contrast, the formal presentations by the parties were extremely abbreviated. The admissible evidence actually presented to the judge paled in comparison with the inadmissible material contained in the presentence report. The State submitted a four-page sentencing memorandum urging imposition of the death penalty. Summerlin's attorney submitted nothing. Neither side made an opening statement. The State's formal evidentiary presentation on aggravation consisted of less than one transcript page. Summerlin's counsel declined to introduce testimony as to mitigation; rather, he asked the judge only to review the material contained in the presentence report. Thus, the cumulative presentation of each side's case in chief resulted in less than one page of trial transcript. The only live testimony was a brief presentation by the State to rebut medical statements contained in the presentence report. When viewed by volume, well over ninety percent of the material received by the sentencing judge in this case could not have been presented to a capital sentencing jury. Such a proceeding is not one that bears "the hallmarks of a trial on guilt or innocence."

The point of this discussion is not to examine whether trial errors occurred in any particular case, including this one, but to analyze whether requiring a jury to make the relevant findings would reduce the risk of an erroneous decision. A review of the cases demonstrates that judge capital sentencing proceedings have been contaminated by a large volume of inadmissible evidence and marked by truncated presentations by the parties. We have presumed that the sentencing judge could sort out the truly relevant, admissible evidence from this morass. The relevant question is not whether judges have been able to do so, but whether subjecting penalty-phase evidence to the crucible of a formal trial by jury would reduce the risk of error.

There is little doubt that it would. As Harry Kalven, Jr. and Hans Zeisel described it in their seminal study on the jury system:

> In addition to his wide experience with the likelihood that the defendant before him is guilty, the judge is exposed to prejudicial information which the law, in its regard for the right of the defendant, aims to screen out of the evaluation of his guilt or innocence. The law's ideal in this situation may be something of a libertarian luxury. Our only point is that the law cannot easily achieve it without a jury.

Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 127 (Little, Brown 1966).

If there is any place in which adherence to evidentiary rules, constitutional restraints, and the defendant's confrontation rights is paramount, it must be when the defendant is exposed to the penalty of death. Subjecting penalty-phase presentations to the rigors and restrictions of a jury trial necessarily will improve the quality of presentation and diminish the risk of an erroneous verdict.

A second primary accuracy-enhancing role of a jury in capital cases is to make the important moral decisions inherent in rendering a capital verdict. The Supreme Court "has emphasized that a sentence of death must reflect an ethical judgment about the 'moral guilt' of the defendant." *Schiro v. Indiana,* 475 U.S. 1036, 1038 (1986) (Marshall, J., dissenting from the denial of certiorari) (citing *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982)). One of the critical functions of a jury in a capital case is to "maintain a link between contemporary community values and the penal system." *Witherspoon v. Illinois,* 391 U.S. 510, 520 n.15 (1968). Thus, "in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" *Jones v. United States*, 527 U.S. 373, 382 (1999) (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988)).

" '[T]he men and women of the jury may be regarded as a microcosm of the community.' " *Harris v. Alabama*, 513 U.S. 504, 517 (1995) (Stevens, J., dissenting) (quoting *Royal Commission on Capital*

Punishment 1949-1953, Report 200 (1953)). There could "therefore be no more appropriate body to decide whether the fellow-citizen whom they have found guilty of murder should suffer the penalty of death prescribed by the law or should receive a lesser punishment." *Id.* Thus, as Justice Breyer noted in his concurring opinion in *Ring,* entrusting a jury with the authority to impose a capital verdict is an important procedural safeguard, because the jury members "are more attuned to the community's moral sensibility," "reflect more accurately the composition and experiences of the community as a whole," and act to "express the conscience of the community on the ultimate question of life or death." 536 U.S. at 615-16 (Breyer, J., concurring in the judgment) (internal citations and quotation marks omitted).[16]

This principle is not only true as a general matter in capital murder verdicts, but it has specific application to determination of some of the aggravating factors contained in Arizona's death penalty scheme. For example, one of the two aggravating circumstances found by Judge Marquardt in this case was that the murder was committed "in an especially heinous, cruel or depraved manner." Ariz. Rev. Stat. § 13-703(F)(6). The Arizona Supreme Court has noted that these are "admittedly broad subjective terms." *State v. Vickers*, 768 P.2d 1177, 1188 n.2 (Ariz. 1989). The assessment of whether a crime is "heinous" depends on the "mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Gretzler*, 659 P.2d 1, 10 (Ariz. 1983) (citations omitted). As we noted in discussing this aggravating factor in *Adamson*: "These assessments directly measure a defendant's 'moral

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16. The dissent assails the use of juries in capital sentencing. This criticism misses the central issue. The presence of some imperfections in jury sentencing does not affect the conclusion that juries are ultimately more accurate than judges. While individual jurors may hold emotional or legally inaccurate views, the requirement of unanimity across twelve individuals significantly reduces the chance that these views will hold sway. Moreover, the fact that some jurors feel sympathy or pity does not imply that the verdict is ultimately governed by these emotions. *See, e.g.*, Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 65 (2000) (noting the lack of correlation between feelings of sympathy or pity and a juror's final vote).

guilt' and overall culpability—traditionally the jury's domain of decision." 865 F.2d at 1027.

These assessments may be influenced by the possible acclimation of the judge to the capital sentencing process. Most jurors in capital cases will never sit on another case in which the death penalty is sought. Judges, by contrast, confront death penalty cases on a regular and sometimes routine basis in Arizona. For instance, Judge Marquardt, who sentenced Summerlin to death, imposed capital punishment on James Fisher in a separate case on the same day. A reasonable inference from the habituation brought about by imposing capital punishment under near rote conditions is that a judge may be less likely to reflect the current conscience of the community and more likely to consider imposing a death penalty as just another criminal sentence. Indeed, when questioned about another capital case in which his judgment was being assailed because he purportedly slept through portions of the short penalty-phase hearing, Judge Marquardt answered that he was unable to recall the case, but "said he had no doubt that the death penalty was warranted." Adam Liptak, *Judge's Drug Use at Issue in 2 Death Sentences*, N.Y. TIMES, May 16, 2002, at A1. "These guys have sentenced themselves," he is reported to have said. *Id.*

Of course, Judge Marquardt's conduct is not at all representative of the Arizona judiciary—a point that must be underscored. However, the extremity of his actions highlights the potential risk of accuracy loss when a capital decision is reposed in a single decision-maker who may be habituated to the process, or who may not treat capital sentencing in accordance with the heightened requirements that the Eighth Amendment imposes. Obviously, in Summerlin's case, the concern is not merely theoretical.

In addition, unlike judges, juries do not stand for election in Arizona and therefore are less apt to be influenced by external considerations when making their decisions. As Justice Stevens has commented, "given the political pressures they face, judges are far more likely than juries to impose the death penalty." *Harris*, 513 U.S. at 521 (Stevens, J., dissenting). This postulate has empirical support: Judges

who face election are far more likely to impose the death penalty than either juries or appointed judges. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 793-94 (1995) (discussing studies documenting the existence of a statistically-significant correlation between an increased override of juries' recommendations against the death penalty by state judges and occurrence of judicial elections in Alabama, Florida, and Indiana); Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 Wis. L. Rev. 1017, 1039-44 (same); *see also* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 62 (2002) (citing empirical examination of death penalty decisions issued by the California Supreme Court between 1976 and 1996). It also has anecdotal support.[17]

These reasons underscore Justice Breyer's observation in *Ring* that "the danger of unwarranted imposition of the penalty cannot be avoided unless 'the decision to impose the death penalty is made by a jury rather than by a single governmental official.' " 536 U.S. at 618 (Breyer, J., concurring in the judgment) (quoting *Spaziano v. Florida*,

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17. *See* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 470-75 (1999) (describing a variety of campaigns to unseat state judges based on their alleged failure to impose or affirm death sentences); Stephen B. Bright et al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases*, 31 Colum. Hum. Rts. L. Rev. 123 *passim* (1999) (providing additional examples of judges under attack due to the outcomes of capital cases over which they presided); *Symposium, Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb. L.J. 239, 270-73 (1994) (presenting statements by judges participating in symposium in which they described criticism they faced during elections based on their decisions in capital cases).

468 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part)).

[16] For all of these reasons, exemplified by the facts of this case, there is little doubt that the rule announced in *Ring* will significantly improve the accuracy of capital trials in Arizona. This conclusion is not—and should not be considered as—a negative assessment of the many excellent state trial judges in Arizona, many of whom have been national leaders in improving the jury system. *See, e.g.*, B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 Judicature 280 (1996). However, the structure of Arizona capital sentencing allows extra-judicial factors to enter into the ultimate judgment such as the consideration of inadmissible evidence, political pressure, truncated evidentiary presentation, and prior experience with other capital defendants that would be absent from a jury's consideration of penalty-phase evidence.

[17] If the allegations concerning Judge Marquardt are true, Summerlin's fate was determined by a drug-impaired judge, habituated to treating penalty-phase trials the same as noncapital sentencing, who relied upon inadmissible evidence in making the factual findings that sentenced Summerlin to death. Although no system is perfect, relying on a jury to administer capital punishment unquestionably reduces the risk of error by reposing trust in twelve individuals who must agree as to the presence of aggravating factors beyond a reasonable doubt, whose continued job security is not threatened by their decision, and whose consideration is based solely on admissible evidence subject to the rigors of cross-examination.

Taking into account the heightened attention that the Eighth Amendment obligates us to afford capital cases, the inevitable conclusion must be that a requirement of capital findings made by a jury will improve the accuracy of Arizona capital murder trials.

The second requirement of the *Teague* exception provides that the newly announced rule must be a "watershed rule" that alters our understanding of bedrock procedural elements essential to the fairness of the proceeding. *Sawyer*, 497 U.S. at 242. Although Eighth Amendment concerns are implicated in *Ring*, the bedrock procedural element at issue is the provision of the Sixth Amendment right to a jury trial.

Ring not only changed the substantive criminal law of Arizona, but it fundamentally altered the procedural structure of capital sentencing applicable to all states. *Ring* established the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty. 536 U.S. at 609. *Ring* requires the vacation of a capital judgment based on judge-made findings.

A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). If structural error is present, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-78 (1986) (citation omitted).

Depriving a capital defendant of his constitutional right to have a jury decide whether he is eligible for the death penalty is an error that necessarily affects the framework within which the trial proceeds. Indeed, the trial has proceeded under a completely incorrect, and constitutionally deficient, framework. In short, allowing a constitutionally-disqualified factfinder to decide the case is a structural error, and *Ring* error is not susceptible to harmless-error analysis.

This conclusion is compelled by the analysis in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In that case, the Supreme Court

considered whether a deficient reasonable-doubt instruction[18] was subject to harmless-error analysis. *Id.* at 277. In resolving the question, Justice Scalia first noted that the Sixth Amendment right to a jury trial "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding." *Id.* at 277 (citing *Sparf v. United States*, 156 U.S. 51, 105-06 (1895)). To determine whether harmless error exists, he noted, the Supreme Court must examine "the basis on which 'the jury *actually rested* its verdict.' " *Id.* at 279 (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (emphasis added in *Sullivan*)). Given that, Justice Scalia observed the "illogic of harmless-error review" under those circumstances because a review could occur only if a court "hypothesize[d] a guilty verdict that was never in fact rendered." *Id.* at 279-80. The Court thus concluded that the *Cage* error was structural because any constitutionally defective reasonable doubt jury instruction "vitiates *all* the jury's findings" and "[a] reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done." *Id.* at 281 (emphasis in original). "And when it does that, 'the wrong entity judge[s] the defendant guilty.' " *Id.* (quoting *Rose*, 478 U.S. at 578) (alteration in original).

In our case, the wrong entity found Summerlin to be guilty of a capital crime. Here, as in *Sullivan*, there was no jury verdict within the meaning of the Sixth Amendment and no constitutionally cognizable finding to review. A complete deprivation of the right to a jury is an error that does not arise during a presentation to a jury. Rather, such an error indisputably affects "the framework within which the trial proceeds." *Rose*, 478 U.S. at 310. This type of error cannot be cured, or determined harmless, by examining other mitigating circumstances that may have been presented at trial because, as Justice Scalia observed:

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18. The instruction at issue in *Sullivan* was similar to the one held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam). Thus, the question in *Sullivan* was whether *Cage* error was subject to harmless error analysis under *Chapman v. California*, 386 U.S. 18 (1967).

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Sullivan, 508 U.S. at 280 (citing *Bollenbach v. United States*, 326 U.S. 607, 614 (1946)).[19]

Sullivan's logic thus applies with even greater force where, as here, there was *no jury finding at all*. As Justice Scalia observed in *Sullivan*, under the Sixth Amendment, a judge "may not direct a verdict for the State, no matter how overwhelming the evidence." *Id.* at 277. If a judge is constitutionally precluded from directing a verdict for the State, then, perforce, a judge sitting without a jury cannot constitutionally enter a judgment of conviction for capital murder. In this sense, *Ring* error indisputably affects the framework of the trial and must therefore constitute structural error.

The Supreme Court's recent opinion in *Nguyen v. United States*, 123 S. Ct. 2130 (2003), reaffirms that any decision of an improperly constituted judicial body must be vacated. In *Nguyen*, the Supreme Court assessed a series of judgments rendered by a federal appellate court panel on which a "non-Article III judge" served. 123 S. Ct. at 2133-34. Vacating this group of judgments, the Supreme Court reasoned that an appellate panel that included a non-Article III judge proved an "impermissible" and "unauthorized" decisional body, one that necessarily conflicted with a "strong policy concerning the proper administration of judicial business." *Id.* at 2135-36 (citation and internal quotation marks omitted). Because the "validity" of the relevant

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19. Likewise, we have held that a constitutionally deficient indictment is a structural defect requiring reversal because the indictment "fail[ed] to ensure that [the defendant] was prosecuted only 'on the basis of the facts presented to the grand jury.'" *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) (quoting *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994)). We noted that "[f]ailing to enforce this requirement would allow a court to 'guess as to what was in the minds of the grand jury at the time they returned the indictment.' " *Id.* (quoting *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979)).

judicial body was fundamentally flawed, and because this "plain defect" was incurable, *Nguyen* explained, the decisions reached by that body must be vacated. *Id.* at 2137-38; *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-85 (1982) (holding that delegation to adjunct bankruptcy judges of powers beyond those conferred to non-Article III judges rendered an entire administrative scheme unconstitutional).

The principle animating *Sullivan, Nguyen,* and *Northern Pipeline* provides that where an improperly constituted or situated tribunal reaches a decision, that decision is infected with a "plain defect" and must be vacated. *Nguyen,* 123 S. Ct. at 2137-38. Whether before an improperly constituted federal appellate panel, a flawed jury panel, a biased judge, or a judge without fact-finding authority in particular contexts, even an otherwise error-free trial is subject to reversal because the error affects the very framework within which the trial proceeds. *Id.* Such structural error indisputably arises here.[20]

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20. The Arizona Supreme Court did not have the benefit of *Nguyen* when it decided *Towery* and *Ring II*. Thus, the Court assumed that the question of "who[ ] decides" the existence of aggravating circumstances was susceptible to harmless-error review. *Towery*, 64 P.3d at 834-35. For the reasons already discussed, however, harmless error cannot be assessed in a void, and, without a jury finding, there is nothing for the appellate court to review. The Arizona Supreme Court primarily relied on *Neder v. United States*, 527 U.S. 1 (1999), but *Neder* in fact buttresses, rather than controverts, our conclusion that *Ring* error is structural. In *Neder*, the Supreme Court held that the failure to submit a materiality instruction was subject to harmless-error analysis. 527 U.S. at 8-15. This, the Arizona Supreme Court reasoned, was akin to depriving a defendant a jury trial in a capital case penalty phase. *Towery*, 64 P.3d at 834-35. But *Neder* itself provides the crucial analytic distinction by identifying structural errors not susceptible to harmless-error analysis, namely errors that "infect the entire trial process." 527 U.S. at 8 (citing *Brecht v. Abrahamson*, 507 U.S. at 630). These are errors that "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' " *Id.* (quoting *Rose*, 478 U.S. at 577- 78). Examples of structural error provided by *Neder* are racial discrimination in jury selection, *see Vasquez v. Hillery*, 474 U.S. 254 (1986); biased judges, *see Tuney v. Ohio*, 273 U.S. 510 (1927); and denials of public trials, *see Waller v. Georgia*, 467 U.S. 39 (1984). *Neder*, 527 U.S. at 8. As (continued...)

Application of the heightened scrutiny commanded by the Eighth Amendment in capital cases underscores the structural nature of this Sixth Amendment constitutional infirmity. The Sixth Circuit recently considered whether harmless-error analysis could apply in a capital case under similar circumstances in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), *petition for cert. filed*, Nos. 02-1369, 02-8849, 71 U.S.L.W. 3613 (Mar. 4, 2003). In that case, the Sixth Circuit held that a death sentence could not be imposed when the state had failed to charge the aggravating circumstance and the jury had not found the aggravating circumstance beyond a reasonable doubt. *Id.* at 420. In reaching its decision, the Sixth Circuit specifically rejected the theory that a harmless-error analysis under a *Neder* theory could apply, noting that "[t]here is no suggestion in the Chief Justice's opinion in *Neder* that harmless error would protect a directed verdict for the State on a crucial finding under the Eighth Amendment in a capital case." *Id.* at 421. The court further noted:

> Harmless-error review in [capital] cases should apply only when the jury has actually performed its function under the Eighth Amendment. The jury in this case never made a judgment at all on the only possible aggravating circumstance—a constitutionally indispensable requirement without which the death penalty cannot be imposed. The State's argument that the error here can be excused as harmless would lead to the conclusion that any, or all, elements required by a state's capital sentencing system may be supplied by judges rather than the jury. Neither the Eighth Amendment nor Ohio's own statutes adopted in order to comply with it permit such a gross deviation from the principle of jury sentencing according to expressly stated, clear statutory standards.

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20. (...continued)
Neder makes clear, for structural error, it does matter "who decides" the case and in what context. There is a vast difference between not submitting the element of materiality to the jury for decision and having no jury decision at all.

Id. at 422.

Given *Ring*'s declaration that a defendant is entitled under the Sixth Amendment to a jury verdict in the penalty phase of a capital case, the substitution of a non-jury verdict cannot be subject to harmless-error analysis. *Ring* error is one " 'affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " *Neder,* 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 310).

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That *Ring* error is structural is a critical consideration in determining whether the second *Teague* exception has been satisfied. It does not, however, end our inquiry. *See Tyler v. Cain,* 533 U.S. 656, 666-67 (2001). The Supreme Court has explained on numerous occasions that a "truly watershed case" is one of a "small core of rules" that is "groundbreaking." *See, e.g., O'Dell*, 521 U.S. at 167; *Caspari*, 510 U.S. at 396; *Graham*, 506 U.S. at 478. The newly announced rule must enhance accuracy, improve fairness, and dictate "observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 311 (plurality) (internal quotation marks omitted).

As previously noted, the procedure at issue in *Ring* had been reviewed by the Supreme Court on prior occasions and had been found constitutionally sound. *See Apprendi*, 530 U.S. at 496-97; *Walton*, 497 U.S. at 649. In a sharp reversal of course, however, the Supreme Court in *Ring* determined that when the Arizona court adhered to prior Supreme Court law, it violated the defendant's fundamental right to have his guilt determined by a jury trial.

The Supreme Court's decision in *Ring* affects the structure of every capital trial and has rendered unconstitutional every substantive statute in conflict with its dictates. It involves the structure of penalty-phase trials which, unlike non-capital sentencing proceedings, are subject to the constraints of the Double Jeopardy Clause. *Bullington,* 415 U.S. at 439. Thus, *Ring*'s effect on capital murder cases is akin to

that of *Furman,* which declared that death penalty statutes vesting complete discretion in the judge or in the jury, like Arizona's, were unconstitutional. *Furman*, as already noted, was given full retroactive effect for the purposes of federal habeas review. *See Moore*, 408 U.S. at 800.

Ring's impact thus is far greater than the impact of the *Mills/McKoy* rule, which some of our sister circuits have determined to be a "watershed rule" under *Teague*. *See Gall v. Parker*, 231 F.3d 265, 323-24 (6th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001); *Williams v. Dixon*, 961 F.2d 448, 455-57 (4th Cir. 1992).[21]

In *Williams*, Chief Judge Ervin analyzed the *Mills/McKoy* rule in detail and concluded that: "Given the history of the Eighth Amendment jurisprudence and the constitutional requirement of individualized sentences, we believe that a rule striking down an arbitrary unanimity requirement has the same 'primacy and centrality' of *Gideon* [*v. Wainwright*, 372 U.S. 225 (1963)]." 961 F.2d at 456. The Fourth Circuit underscored the language in *Mills* that "it would certainly be *the height of arbitrariness* to allow or require the imposition of the death penalty under the circumstances [where one holdout juror prevents the consideration of mitigating evidence]." *Id.* (quoting *Mills*, 486 U.S. at 374) (emphasis added and alterations inserted in *Williams*).[22]

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21. The *Mills/McKoy* rule struck down state procedures that limited any given juror's consideration of mitigating circumstances in capital sentencing to such evidence that the entire jury had found relevant. *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988). Both the Fourth and the Sixth Circuits have held that the "*Mill/McKoy*" rule is a "watershed rule" that warrants retroactive application.

22. *But see Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992) (holding without analysis that *Teague* bars retroactive application); *Miller v. Lockhart*, 65 F.3d 676, 686 & n.6 (8th Cir. 1995) (holding that *Teague* bars retroactive application of *Mills* and observing that the defendant never raised argument that *Mills* falls into a *Teague* exception).

Ring does not merely announce a supplemental procedural safeguard. Rather, it establishes bedrock procedural requirements that affect the structure of every penalty-phase hearing in a capital case. Application of the rule in *Ring*, like the *Mills/McKoy* rule and other watershed rules, will increase the accuracy of capital murder trials significantly. The absence of the rule's protection necessarily constitutes structural error and deprives a defendant of a fundamental right.

[18] Moreover, *Ring* implicates the foundation of the capital murder trial itself by declaring that judges are constitutionally unqualified to decide whether a defendant is eligible for the death penalty. Thus, the rule in *Ring* is central to the conduct of every capital murder trial. *Ring* "effectively declare[d] five States' capital sentencing schemes unconstitutional," *Ring*, 536 U.S. at 621 (O'Connor, J., dissenting), and cast doubt on the viability of at least four other state capital murder statutes. *Id.; see also Brief for Amici Curiae Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, New York District Attorney's Ass'n, Pennsylvania, South Carolina, Utah, and Virginia to the Supreme Court in Ring* at *4 & n.2, *Ring* (No. 01-488), *available at* 2002 WL 481140. In short, *Ring* directly impacted the substance of approximately one-fourth of the 38 state capital murder statutes and established irreducible minimum structural requirements for all. It fundamentally altered our view of how the Sixth Amendment right to a jury trial affected the Eighth Amendment's requirement that state statutes narrow the class of individuals eligible for the penalty of death. By deciding that judges are not constitutionally permitted to decide whether defendants are eligible for the death penalty, the Supreme Court altered the fundamental bedrock principles applicable to capital murder trials. When viewed in both theoretical and practical terms, *Ring* redefined the structural safeguards implicit in our concept of ordered liberty.

[19] The *Teague* doctrine was based on the notion that one of the "principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Bousley*, 523 U.S. at 620

(alteration in original; internal quotation marks omitted). The rule announced in *Ring*, like other watershed rules, is designed to reduce significantly the risk of an erroneous capital verdict. Thus, the rule announced in *Ring* defines structural safeguards implicit in our concept of ordered liberty that are necessary to protect the fundamental fairness of capital murder trials. *Ring* satisfies the criteria of *Teague* and must be given retroactive effect on habeas review.

D

The Warden's primary argument against applying *Ring* retroactively relies on *United States v. Sanchez-Cervantes*, in which we held that *Apprendi* may not be applied retroactively on habeas review. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 670 (9th Cir. 2002). However, our analysis in *Sanchez-Cervantes* does not conflict with our conclusion that *Ring* must be applied retroactively. First, as we have noted, the decision in *Apprendi* clearly was not one of substantive criminal law. Unlike the result in *Ring*, *Apprendi* did not cause the relevant statute to be declared unconstitutional. Second, *Apprendi* errors are not structural and therefore are subject to harmless-error analysis. *Id.* at 669-70 (citing *Buckland*, 277 F.3d at 1184) (internal quotation marks omitted). Third, as we reasoned in *Sanchez-Cervantes*, *Apprendi* was neither a rule that greatly enhanced the accuracy of sentencing proceedings nor a "sweeping rule" in light of the finding that it "would apply only in a limited number of cases." *Id.* at 669. Accordingly, it could not qualify as a "watershed" rule. Fourth, capital cases are structurally much different from noncapital criminal trials. As already noted, non-capital sentencing has historically been within the province of the judge. In contrast, the penalty-phase proceeding of a capital murder case "resembles a trial," *Walton*, 497 U.S. at 704, and, unlike the non-capital sentencing proceedings, is subject to the constraints of the Double Jeopardy Clause. *See Bullington*, 451 U.S. at 439. Finally, the Eighth Amendment constraints applicable to capital trials demand a heightened analysis inapplicable to the usual *Apprendi* situation. Thus, neither *Sanchez-Cervantes* nor the retroactive application of *Apprendi* governs our analysis.

VI

[20] In summary, we affirm the district court's judgment denying Summerlin's petition for habeas corpus for relief from his conviction for first-degree murder. We hold, both on substantive and procedural grounds, that the Supreme Court's decision in *Ring* has retroactive application to cases on federal habeas review. Thus, we reverse the judgment of the district court insofar as it relates to the imposition of the penalty of death.

Given our resolution of the penalty-phase issues based on the retroactive application of *Ring*, we need not, and do not, reach the merits of any of the other penalty-phase errors raised on appeal. We also need not reach the issue of whether cumulative errors require reversal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED

REINHARDT, Circuit Judge, concurring:

I join fully in Judge Thomas's excellent opinion for the court. I could not improve on the legal arguments he has offered. I agree entirely that *Ring* establishes a new substantive rule and that to the extent the rule is procedural it constitutes a watershed rule that enhances the accuracy of capital sentencing and alters our understanding of a bedrock procedural provision.

I write separately only to emphasize that a contrary result would be unthinkable in a society that considers itself both decent and rational. Few seriously doubt that the death penalty is generally imposed in an arbitrary manner in this nation. The vagaries of the process by which prosecutors select those they believe worthy of death; the chances that defendants will be assigned incompetent rather than competent legal counsel, and that such representation will continue throughout the state and federal direct and collateral proceedings; the fortuitous circumstances which in combination account for the fact-finders'

decisions in capital proceedings as to who shall live or die: all result in a system of execution by chance or fate. And this is wholly aside from factors such as race, IQ, poverty, wealth, geography, and sex, each of which plays a significant part in the business of determining which persons the state decides to execute.

But surely there is a limit to arbitrariness — even to arbitrariness in the imposition of the death penalty. And executing people because their cases came too early — because their appeals ended before the Supreme Court belatedly came to the realization that it had made a grievous constitutional error in its interpretation of death penalty law, that it had erred when it failed to recognize that the United States Constitution prohibits judges, rather than jurors, from making critical factual decisions regarding life and death in capital cases — is surely arbitrariness that surpasses all bounds.

It is not uncommon for the Supreme Court to make significant errors in interpreting the constitution, *see, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Walton v. Arizona*, 497 U.S. 639 (1990), and to correct those errors when it recognizes its mistakes, *see, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Lawrence v. Texas*, 123 S.Ct. 2472 (2003); *Ring v. Arizona*, 536 U.S. 584 (2002). The Court is to be commended for the integrity it displays in acknowledging its failures in such cases. Ordinarily, the consequences are that the judicial reversal is greeted with relief and the error has no further adverse effects. Certainly, all must agree that constitutional errors made by the Court should not have any greater adverse consequences than necessary. Here, however, in the dissent's view, additional people should now be put to death following unconstitutional proceedings even though the Court has recognized the unconstitutionality inherent in those future executions, and even though had the Court not erred initially, the death sentences in question would previously have been set aside. To me, this represents a seriously warped view of the nature of our legal system, and the relationship of that system to its ultimate objective: justice.

The dissent expresses a peculiar lack of confidence in juries, and states that the "conscience of the community is not necessarily the fairest adjudication for a capital defendant" because considerations of race and other biases influence jurors' actions. Our recent experience shows precisely the opposite. When the Attorney-General decided to order federal death penalty prosecutions in a far wider range of cases and places than ever before, juries responded by expressing the "conscience of the community." Since General Ashcroft has launched his expanded federal death penalty campaign, sometimes over the objections of local federal prosecutors, juries have returned 21 verdicts. In 20 of them they have voted for life rather than death.[1] Despite those who distrust it, the "conscience of the community" is indeed, a fair, democratic, and unbiased expression of societal values. To distrust juries is plainly to distrust democracy.

But even more important, my dissenting colleagues believe that it is perfectly proper for the state to execute individuals who were deprived of their constitutional right to have a jury make their death penalty decisions, if the judicial machinery had brought the direct appeal portion of their legal proceedings to an end before the day on which the Supreme Court recognized its constitutional error. In other words, my colleagues believe that those who had reached the stage of habeas proceedings as of the day of the Court's belated enlightenment may be executed, but those who were still awaiting a final answer to their appeals may not.

Wholly aside from the fact that the majority is unquestionably correct with respect to its careful analysis of retroactivity law, I remind my dissenting colleagues that "death is different." *Ring v. Arizona*, 536 U.S. 584, 606 (2002); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion) ("This especial concern [for reliability in capital proceedings] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)

1. See list of cases on file in Clerk's office.

(plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself."). We do not execute people according to ordinary legal principles that may be good enough for our more routine decisions. When the state assumes the role of the Deity, it must exercise greater care. Thus, even if the dissenting argument were more closely attuned to traditional retroactivity law — even if that law demanded a different result in run-of-the-mill cases — I would not apply those rules here. In order to understand why, we need only look to the facts revealing the inherent fallibility of our criminal justice system.

This country imposed approximately 5,760 death sentences between 1973 and 1995.[2] During that time, "courts found *serious, reversible error in nearly 7 of every 10* of the thousands of capital sentences that were fully reviewed during the period."[3] State courts reviewed 4,578 of those cases and reversed 41% for serious error on direct appeal; another 10% were reversed on state collateral review.[4] Federal courts found error in 40% of the 599 cases which state courts affirmed. 82% of defendants who received a second trial after a successful state collateral petition did not receive a death sentence; 7% of those defendants were found innocent or had their charges dropped. Recently in Illinois, a conservative Governor declared a moratorium on executions after discovering that since the death penalty was reinstated, more individuals convicted of capital crimes and sent to death row had been exonerated than executed. Following a full investigation, he pardoned some of the prisoners on death row and commuted the

2. *See* James S. Liebman, et al., *Broken System: Error Rates in Capital Cases, 1973-1995* at 5 (2000) *available at* <http://justice.policy.net/jpreport/>.

3. *Id.* at i (emphasis added).

4. *See id.* at 38-40.

sentences of the rest.[5] Since 1973, one hundred and eight people nationwide have been released from death row upon evidence of their innocence; there is no comparable statistic yet available for those who have been executed.[6] It is virtually certain that other people who are actually innocent — much less those convicted in violation of the Constitution — currently await execution.

Let me put the abstract problem of the retroactivity of *Ring* in perspective, and let me state it as clearly as possible. In *Walton v. Arizona*, 497 U.S. 639 (1990), Jeffrey Alan Walton tried to persuade the then-members of the Supreme Court that a jury, not a judge, must make the critical factual decisions regarding his ultimate fate. In rejecting his argument, the Court erred, as it now concedes. In *Walton*, the Court mistakenly decided that the Constitution did not entitle capital defendants to a jury trial at the penalty phase. All death row prisoners who advanced the constitutional argument that Walton had unsuccessfully asserted subsequently received the same answer that he did. Some capital defendants continued to assert the claim, hoping that the Court would change its mind. Others believed that it would be futile to continue to make an argument that the Court had just rejected. As a result of the Court's error, some of these individuals have already been executed in violation of their constitutional rights. Others are still awaiting execution. The question before us is: may the state now execute those persons as to whom the Supreme Court ruled erroneously (directly or indirectly) with respect to their constitutional claims, although it is prevented from executing those as to whom the Court had not yet formally erred? May the state execute the "Jeffrey Alan Waltons" who are now on death row — the prisoners who previously

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5. *See, e.g.*, Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at 1.

6. *See* Death Penalty Info. Ctr., Innocence and the Death Penalty, *at* www.deathpenaltyinfo.org/article.php?did=412&scid=6 (visited July 5, 2003). As of June 2003, DNA tests — a reasonably new scientific development — have established the innocence of at least 128 individuals who were wrongly convicted and imprisoned. *See* David Feige, *The Dark Side of Innocence*, N.Y. TIMES, June 15, 2003, § 6, at 15.

correctly argued (or were incorrectly deterred from arguing) that their executions would be unconstitutional, the prisoners whose causes were erroneously turned down by the Supreme Court — the prisoners who were right about the Constitution when the Supreme Court was wrong?

To put it differently, may the state now deliberately execute persons knowing that their death sentences were arrived at in a manner that violated their constitutional rights? Is it possible that prisoners will now be executed by the state solely because of the happenstance that the Supreme Court recognized the correctness of their constitutional arguments too late — on a wholly arbitrary date, rather than when it should have? Will we add to all of the other arbitrariness infecting our administration of the death penalty the pure fortuity of when the Supreme Court recognized its own critical error with respect to the meaning of the Constitution? Can we justify executing those whose legal efforts had reached a certain point in our imperfect legal process on the day the Supreme Court changed its mind, while invalidating the death sentences of those whose cases were waiting slightly further down the line?

I do not think it rational for a society to make its decisions regarding whom it will kill in the manner that my dissenting colleagues suggest. A state's decision to take the life of a human being, if it can be justified at all, must rest on a far less arbitrary foundation. And if our society truly honors its constitutional values, it will not tolerate the execution by the state of individuals whose capital sentences were imposed in violation of their constitutional rights. It should not take a constitutional scholar to comprehend that point.

RAWLINSON, Circuit Judge, with whom O'SCANNLAIN and TALLMAN, Circuit Judges, join, dissenting:

I must respectfully dissent from that portion of the majority opinion discussing the retroactive application of *Ring v. Arizona*. The majority opinion negates the presumption against retroactive application of a new rule articulated in *Teague v. Lane*, 489 U.S. 288, 304, 310 (1989). The underpinning of the majority opinion is an

assumption that the Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002), represents a new substantive rule or, alternatively, a new procedural rule that seriously enhances accuracy of capital sentencing proceedings, and alters our understanding of "bedrock procedural elements essential to the fairness of the proceeding." Maj. Op. at 12760 (citing *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).

I. The *Ring* Decision Announces A Procedural Rule Rather Than A Substantive One.

A. Ring's *Reliance upon and Similarity to* Apprendi

In my view, the majority opinion wanders afield in the first instance by holding that *Ring* contains a new substantive rule despite the teaching of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which the Supreme Court expressly relied in deciding *Ring*. *See Ring v. Arizona*, 536 U.S. at 602.

In *Apprendi*, the defendant pled guilty to two counts of second-degree possession of a firearm and one count of unlawful possession of a bomb. 530 U.S. at 469-70. After accepting Apprendi's guilty plea, the trial court conducted a hearing and concluded that Apprendi's firing of several bullets into the home of an African-American family was "motivated by racial bias." *Id.* at 470-71. This conclusion resulted in a "hate crime enhancement," doubling the maximum potential sentence. *Id.* Apprendi was sentenced to a twelve-year term of imprisonment, two years more than the ten-year maximum for the firearms offense. *Id.* at 474.

The Supreme Court recognized that the constitutional guarantees embedded in the Sixth Amendment and the Fourteenth Amendment were at stake. *Id.* at 476-77. In keeping with those guarantees, the Court rendered the ruling that resonated throughout the country: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

In *Ring v. Arizona*, quoting extensively from *Apprendi*, the Supreme Court addressed the Sixth Amendment right to a jury trial in the context of capital sentencing. 536 U.S. at 602-03.

The Supreme Court described its holding in *Apprendi* as a determination "that Apprendi's sentence violated his right to a jury determination that he is guilty of every element of the crime with which he is charged beyond a reasonable doubt. That right attached not only to Apprendi's weapons offense but also to the hate crime aggravating circumstance." *Id.* at 602 (citation, internal quotation marks and alteration omitted).

In overruling *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court in *Ring* noted that, as with the "hate crime" aggravator in *Apprendi*, "Arizona's enumerated aggravated factors [necessary for imposition of the death penalty] operate as the functional equivalent of an element of a greater offense . . . . at *Ring*, 536 U.S. at 609 (citation and internal quotation marks omitted).

The Supreme Court quoted Justice Thomas's concurring opinion in *Apprendi* in recognizing that:

> if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, *the core crime and the aggravating fact together constitute an aggravated crime*, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

536 U.S. at 605 (citation, internal quotation marks and alterations omitted) (emphasis added).

This conclusion of the *Ring* court is pivotal because it is the unlikely linchpin of the majority's conclusion that the Supreme Court's holding in *Ring* is a rule of substance rather than procedure for purposes of the *Teague* retroactivity analysis.

The majority opinion urges us to accept the following syllogism:

- Creation of a separate substantive criminal offense renders a new rule one of substance rather than procedure for purposes of the *Teague* analysis. Maj. Op. at 12751.

- *Ring's* holding requiring that a jury determine the existence of aggravating factors necessary for imposition of the death penalty, creates a distinct offense of capital murder. Ma

- *Ring's* ruling is one of substance rather than procedure for purposes of the *Teague* retroactivity analysis. Maj. Op. at 12752-53.

At first glance, the majority opinion's reasoning exudes considerable appeal. However, closer examination of the first point of the syllogism tarnishes the initial appeal of the majority's logic. Why? Because merely saying that creation of a separate substantive criminal offense renders a rule one of substance rather than procedure does not make it so. If that were true, *Apprendi* would have been a substantive rather than a procedural ruling. As the Supreme Court noted in *Ring*, the "hate crime" aggravator in *Apprendi* operated in the same manner as the death penalty factors in *Walton* to establish a "greater offense." 536 U.S. at 609.

The linkage in *Ring* of the *Walton* death penalty factors and the *Apprendi* hate crime aggravator is fatal to the majority's syllogism. The majority opinion acknowledges, as it must, our recent holding that *Apprendi* may not be applied retroactively on habeas review. *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 670 9th Cir. 2002. Maj. Op. at 12780. The majority makes the following four points in an attempt to distance itself from our holding in *Sanchez-Cervantes:*

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1. The decision in *Apprendi* clearly was not one of substantive law. Maj. Op. at 12780.[1]

Counterpoint: It is equally clear that *Ring* is not a decision of substantive law. As the United States Supreme Court noted in *Ring*, the aggravator in *Apprendi* operated in the same fashion as the aggravators in *Walton* to establish a separate offense. *See Ring*, 536 U.S. at 609. That similarity is more telling than whether or not the statute in question is declared unconstitutional.

2. *Apprendi* violations are subject to harmless error analysis. Maj. Op. at 12780.

Counterpoint: The Supreme Court in *Ring* strongly implied, if not outright held, that harmless error analysis is equally applicable to any imposition of the death penalty by a judge rather than a jury. *See* 536 U.S. at 609. n.7 (citing *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) ("this Court ordinarily leaves it to lower courts to pass on the harmlessness of the error in the first instance"); *see also id.* at 621 (O'Connor, J., dissenting) ("I believe many of these [*Ring*] challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless or plain error review, or because, having completed their direct appeals they will be barred [by *Teague*] from taking advantage of today's holding on collateral review.") (citations omitted).

3. *Apprendi* was not a watershed rule of procedural law. Maj. Op. at 12780.

Counterpoint: Neither is *Ring* a watershed rule of procedural law. For the reasons discussed in section II below, the rule pronounced in *Ring* would not greatly enhance the accuracy of sentencing proceedings, and would affect only a limited number of cases.

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1. The Majority Opinion's discussion of the retroactivity of *Apprendi* is included in its alternative discussion of *Ring* as a new procedural rule. However, that discussion is also pertinent to the comparison of *Ring*, *Walton*, and *Apprendi*.

4. Capital cases are structurally different. Maj. Op. at 12780.

Counterpoint: The existence of a capital murder offense does not *per se* establish the substantive nature of the *Ring* ruling. In fact, the Supreme Court recognized in *Ring* that even before the adoption of the Bill of Rights, juries were determining which homicide defendants would be subject to capital punishment. 536 U.S. at 599 (quoting *Walton v. Ariz.*, 497 U.S. 639, 711, Stevens, J., dissenting). A return to that well-established tradition does not lead to the ineluctable conclusion that a substantive rule of law has been established.

Proper application of the holdings in *Ring* and *Apprendi* leads to the opposite conclusion than that reached in the majority opinion: *Ring* did not create a new substantive rule.

B. *The Arizona Supreme Court's* Ring *Analysis*

The majority opinion recognizes that the Arizona Supreme Court has reached the opposite conclusion, namely that *Ring* did not create a new substantive rule. Maj. Op. at 12752. The majority opinion justifies its disregard of the Arizona Supreme Court's holding by stating that "[b]ecause the decisions in [*State v.*] *Towery* [65 P.3d 828 (Ariz. 2003),] and [*State v.*] *Ring* [65 P.3d 915 (Ariz. 2003)] rest on federal law, and not state law, they do not bind us." Maj. Op. at 12752. However, the Supreme Court suggested otherwise in *Ring*, ruling that "the Arizona court's construction of the State's own law is authoritative[.]" 536 U.S. at 603 (citation omitted). The Supreme Court was addressing "the *Apprendi* majority's portrayal of Arizona's capital sentencing law." *Id.* Similarly, in this case we are addressing the *Ring* majority's portrayal of Arizona's capital sentencing law, with the Arizona Supreme Court's construction carrying the same authority. *See id.*

In *Towery*, the Arizona Supreme Court examined Arizona's capital sentencing scheme in light of the *Ring* decision. The Arizona

Supreme Court, with its presumably authoritative grasp of Arizona's statutory scheme, declared that *Ring*:

> changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, *Ring* [ ] altered *who* decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings."

64 P.3d at 833 (emphasis in the original).

In short, *Ring* changed the "who" of the capital sentencing determination, not the "what." A change in who determines the existence of the aggravating factors is quintessentially procedural. *See Sanchez-Cervantes,* 282 F.3d at 668.

The decision of the Arizona Supreme Court in *Towery* is consistent with the United States Supreme Court's explanation of *Apprendi* in *Ring* and our *Teague* analysis of *Apprendi* in *Sanchez-Cervantes.*

C. *Our Sister Circuits'* Ring *Analysis*

> The Tenth and Eleventh Circuit Courts of Appeal have both addressed and rejected retroactive application of *Ring*. The Tenth Circuit court matter-of-factly concluded that *Ring* "is simply an extension of *Apprendi* to the death penalty context. Accordingly, this court's recent conclusion . . . that *Apprendi* announced a rule of criminal procedure forecloses [the] argument that *Ring* announced a substantive rule." *Cannon v. Mullin,* 297 F.3d 989, 994 (10th Cir. 2002) (citation omitted).

Likewise, our recent ruling in *Sanchez-Cervantes* that *Apprendi* pronounced a new rule of criminal procedure, 282 F.3d at 668, forecloses the majority's conclusion that *Ring* pronounced a new substantive rule. As our colleague recently observed when discussing our holding in *Sanchez-Cervantes*:

> We arrived at this conclusion even though every application of the constitutional rule [announced in *Apprendi*] requires distinguishing between the statute's 'elements' and 'sentencing factors' and even though it's almost certain, as a simple matter of mathematical probability, that some defendants would not have been convicted had the statutory elements been submitted to a jury of twelve, instead of decided by a judge alone. There may well be a plausible argument that, because *Apprendi* narrows the class of persons who is likely to be convicted, the rule is substantive. But we have already rejected this argument. Instead, we characterized the rule as procedural because *Apprendi* affects only the identity of the decisionmaker and the burden of proof .
> . . .

United States v. Montalvo, 331 F.3d 1052, 1061 (9th Cir. 2003) (Kozinski, J., concurring).

The Eleventh Circuit case, *Turner v. Crosby*, 2003 WL 21739734 (11th Cir. July 29, 2003), contains a more expansive discussion of the *Ring* retroactivity issue. The court, as did the court in the Tenth Circuit, linked its characterization of *Ring* as a procedural rule to *Ring*'s "status as an extension of *Apprendi*." *Id.* at *35. The court concluded that "because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule." *Id.* at *34.

The analysis in *Turner* is remarkably similar to Judge Kozinski's concurring opinion in *Montalvo*, discussing our holding in *Sanchez-Cervantes. See* 331 F.3d at 1061.

The Eleventh Circuit court reasoned:

> Just as *Apprendi* constitutes a procedural rule because it dictates what fact-finding procedure must be employed, *Ring* constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing. *Ring* changed neither the underlying conduct the state must prove to establish a defendant's crime warrants
> death nor the state's burden of proof. *Ring* . . . altered only *who* decides whether any aggravating circumstances exist and, thus, altered only the factfinding procedure.

Turner, 2003 WL 21739734 at *34 (internal quotation marks and citations omitted) (emphasis in the original).

II *Ring's* Procedural Rule Does Not Fit Within Any Exception to *Teague's* Retroactivity Prohibition.

The majority opinion's alternative holding is that even if *Ring* announced a procedural rule, it nonetheless fits within an exception to the *Teague* retroactivity prohibition. Maj. Op. at 12758.

I disagree with the majority's conclusion that *Ring* is a new procedural rule that seriously enhances the accuracy of capital sentencing proceedings and alters our understanding of bedrock procedural principles. Maj. Op. at 12771.

A. *Serious Enhancement of the Proceedings' Accuracy*

The majority opinion makes its case for accuracy by attacking the objectivity of judges in the capital sentencing context. Maj. Op. at 12760-71. The majority opinion lists the following five problematic circumstances with judge-based capital sentencing:

1. Presentation of inadmissible evidence to judges;

2. More truncated and informal presentation of evidence and argument;

3. Lack of "the conscience of the community";

4. Acclimation of the judge to the capital sentencing process; and

5. Political pressure on judges facing election.

Id.

As with most other matters, there is another side to the story, reflecting the fact that juries have their own problems in the capital sentencing context.

The Capital Jury Project, funded by the National Science Foundation, is an empirical study of "death penalty decision making by jurors." Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases,* 79 Cornell L. Rev. 1, 2 (1993). 916 capital jurors, from 257 capital trials in eleven states, were interviewed. The study revealed that:

> many jurors reached a personal decision concerning punishment before the sentencing stage of the trial,

> before hearing the evidence or arguments concerning the appropriate punishment, and before the judge's instructions for making the sentencing decision. Moreover, most of the jurors who indicated a stand on punishment at the guilt stage of the trial said they were "absolutely convinced" of their early stands on punishment and adhered to them throughout the course of the trial.

William J. Bowers, Marla Sandys, and Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt—Trial Experience, and Premature Decision Making,* 83 Cornell L. Rev. 1476, 1477 (1998).

The study also disclosed that many "early pro-death jurors" presumed that overwhelming proof of guilt justified imposition of the death penalty. *Id.* at 1497. More than half of the jurors were of the view that "death was the only acceptable punishment for . . . repeat murder, premeditated murder and multiple murder." *Id.* at 1504. The data in the study has been described as supporting a conclusion that:

> the presence of structural aggravation and the nature of the life or death decision itself will continue still to promote premature punishment decision making, thus discouraging a full and open evaluation of constitutionally sanctioned sentencing considerations. Beyond this, the data show that punishment concerns also invade and befoul the work of guilt decision making. Jurors frankly admit that they consider punishment in deciding guilt, despite admonitions not to do so.

Id. at 1541.

Any indecision in death penalty deliberations is more likely to be resolved in favor of death. Eisenberg and Wells, *Deadly Confusion,* 79 Cornell L. Rev. at 13. The study suggests that "a defendant on trial

for his life at the punishment stage has one foot in the grave . . . . The juror favoring life faces a struggle . . . that will last throughout the deliberations . . ." *Id.* at 14.

One analysis of the Project's data focused on the South Carolina component of the study. South Carolina "yielded the most extensive set of data of all the states participating . . . encompass[ing] interviews with 187 jurors in fifty-three cases tried in South Carolina between 1988 and 1997." Stephen P. Garvey, *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. Rev. 26, 28-29 (2000). This subset of data reveals that sympathy and pity pervade capital sentencing deliberations despite instructions to the contrary, *id.* at 34, and race is a dominant factor in determining who is sentenced to death. *Id.* at 45.

The empirically established problems with jury sentencing deliberations calls into question the majority's facile conclusion that transfer of capital sentencing responsibility to a jury will enhance the accuracy of the process.

The majority opinion bemoans the fact that inadmissible evidence is presented to judges. Maj. Op. at 12762-63. However, in most states the same inadmissible evidence that most concerns the majority, victim impact statements, is available to jurors. *See* Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. at 48.

The majority opinion also laments the informal presentation of evidence to a judge. Maj. Op. at 12761. In contrast, the Capital Jury Project reveals that more formal presentation of evidence is not of assistance to capital juries. To the contrary, jurors are confused by the aggravating and mitigating standards of proof, Eisenberg and Wells, *Deadly Confusion,* 79 Cornell L. Rev. at 10; are unclear as to whether and when the law mandates death, Bower, Sandys and Steiner, *Foreclosed Impartiality,* 83 Cornell L. Rev. at 1523; and make up their minds before any evidence is presented as to the appropriate penalty. *Id.* at 1477.

The majority opinion views jury determination of the penalty as an indispensable manifestation of the jury's role as the "conscience of the community." Maj. Op. at 12766. However, empirical evidence suggests that the "conscience of the community" is not necessarily the fairest adjudication for a capital defendant. Not only do jurors prejudge defendants, they also engage in penalty negotiations during the guilt phase. Bowers, Sandys and Steiner, *Foreclosed Impartiality,* 83 Cornell L. Rev. at 1477, 1527. Their decisions are tainted by considerations of sympathy, pity, anger and disgust. Garvey, *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. Rev. at 34. And their death determinations are influenced by race. *Id.* at 45.

The majority opinion notes that the judge's acclimation to capital sentencing may negatively influence the judge's assessment of the sentence. Maj. Op. at 12767-68. But not everyone views judges' experience as a negative. *See* Hon. Randall R. Jackson, *Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest,* 55 J. Mo. B. 14, 17 (opining that unjust sentencing disparity is greatly reduced when judges rather than juries impose sentencing).[2]

Finally, the majority refers to the pressures on judges facing election to impose the death penalty. Maj. Op. at 12768. The majority cites to a law review article to support its statement that "judges who face election are far more likely to impose the death penalty." *See* Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases,* 75 B.U. L. Rev. 759, 793 (1995). However, the statement made in the law review article is just that—a bald statement, with no accompanying empirical evidence.

The other law review article cited, Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override,* 1999 Wis. L. Rev. 1017, 1039-44, is a discussion of judicial overrides of jury

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2. Although this article addresses the unique Missouri statutory scheme whereby juries determine all sentences, the principle applies with equal force to capital sentencing.

determinations in Alabama, Florida, Indiana, and Delaware. The article does not even attempt to compare the relative rate of death sentences imposed by juries as opposed to judges. In any event, the comprehensive Capital Jury Project informs us that judges are not alone in facing pressure. Jurors are subjected to similar pressure when deliberating in capital cases. Jurors negotiate votes in order to "avoid [ ] the stigma of being a hung jury." Bowers, Sandys, and Steiner, *Foreclosed Impartiality,* 83 Cornell L. Rev. at 1527. In the final analysis, the jury is still out on the question of whether the decision in *Ring* enhances the accuracy of the capital sentencing process.

That fact defeats the majority opinion's premise that *Ring* fits within the first prong of the *Teague* exception applicable to new procedural rules. its analysis fares no better when the second prong is considered.

B. Ring's *Alteration of Our Understanding of Bedrock Procedural Principles*

The majority opinion rests its conclusion on the observations that *Ring* is not subject to harmless error analysis, and is of widespread application. Maj. Op. at 12772, 12776.

As previously discussed, the Supreme Court implied, if not held, that *Ring* requirements are subject to harmless error analysis. *See* 122 S. Ct. at 2443 n.7. Coupled with that circumstance is the limited application of *Ring* when contemplated in the proper context. Juries alone are responsible for deciding capital sentences in 29 of the 38 states with capital punishment laws. Holly Shaver Bryant, *Capital Punishment/The Death Penalty: Trends in 2002*, Report on Trends in the State Court, National Center for State Courts (2002). Accordingly, *Ring's* application is limited to capital cases in 9 states, a far cry from the majority's ambitious description of *Ring* as "affect[ing] the structure of every capital trial." Maj. Op. at 12777.

In addressing *Ring*'s exemption as a procedural rule from the *Teague* bar on retroactive application, the Eleventh Circuit court

described *Ring* as "not sufficiently fundamental" to constitute a "watershed" rule of criminal procedure. *Turner,* 2003 WL21739734 at *36. (citations omitted). Instead, the court characterized *Ring* as creating a rule "based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context." *Id.* at *37.

The majority's contrary holding that *Ring* created a new substantive rule or, in the alternative, a watershed rule of criminal procedure precipitates an unwarranted circuit split.

III. *Conclusion*

Whether analyzed as a new substantive rule or as a new rule of procedure, the decision in *Ring* does not fall within any of the exceptions set forth in *Teague*. The majority opinion's analysis is not compatible with Supreme Court precedent, our prior rulings, or the law of our sister circuits. In light of *Ring's* adherence to the precepts in *Apprendi*, I would declare the nonretroactivity of *Ring*, and affirm the district court's denial of Summerlin's habeas petition.

APPENDIX B

[FILED Feb 26 2003]

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA, Plaintiff, v. ROBERT CHARLES TOWERY, Defendant.	)	Arizona Supreme Court No. CR-02-0031-PC Maricopa County Superior Court No. CR 91-92648 CONSOLIDATED WITH
STATE OF ARIZONA, Plaintiff, v. ERIC OWEN MANN, Defendant.	)	Arizona Supreme Court No. CR-02-0022-PC Pima County Superior Court No. CR-44903 CONSOLIDATED WITH
STATE OF ARIZONA, Plaintiff, v. JAMES ERIN McKINNEY, Defendant.	)	Arizona Supreme Court No. CR-02-0038-PC Maricopa County Superior Court No. CR 1991-090926 CONSOLIDATED WITH

STATE OF ARIZONA, Plaintiff, v. ROGER WAYNE MURRAY, Defendant.	)	Arizona Supreme Court No. CR-02-0146-PC Mohave County Superior Court No. CR-13057 **OPINION**

Petition for Review from the Superior Court of Maricopa County
No. CR 91-92648
The Honorable Cheryl K. Hendrix
The Honorable James H. Keppel
AFFIRMED

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Petition for Review from the Superior Court of Pima County
No. CR-44903
The Honorable John F. Kelly
AFFIRMED

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Petition for Review from the Superior Court of Maricopa County
No. CR 1991-090926
The Honorable Steven D. Sheldon
AFFIRMED

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Petition for Review from the Superior Court of Mohave County
No. CR-13057
The Honorable James E. Chavez
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McGregor, Vice Chief Justice

¶1 These consolidated actions present the question whether *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) (*Ring II*),[1] which holds that a jury must decide whether aggravating circumstances exist in capital cases, applies retroactively to those defendants whose cases have become final. We conclude that *Ring II* does not apply retroactively to final cases.

I.

¶2 Separate juries found, beyond a reasonable doubt, that Murray, Mann, Towery, and McKinney committed first degree murder. In each petitioner's case, the trial judge conducted a sentencing hearing to determine whether aggravating circumstances existed. In each case, the judge found that the state proved, beyond a reasonable doubt, the presence of at least one aggravating circumstance and that the mitigating circumstances, if any, were not sufficiently substantial to call for leniency. Accordingly, Murray, Mann, Towery, and McKinney all received death sentences. This court affirmed each death sentence on

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1. In *State v. Ring*, 200 Ariz. 267, 279-80 ¶ 44, 25 P.3d 1139, 1151-52 (2001) (*Ring I*), guided by *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), this court held that Arizona's former capital sentencing scheme, in which a judge decided whether aggravating circumstances existed, comported with the Sixth Amendment.

direct review. *State v. Murray*, 194 Ariz. 373, 982 P.2d 1287 (1999); *State v. Mann*, 188 Ariz. 220, 934 P.2d 784 (1997); *State v. Towery*, 186 Ariz. 168, 920 P.2d 290 (1996); *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214 (1996).

¶3 Subsequently, Murray, Mann, Towery, and McKinney each filed a motion for post-conviction relief, arguing in part that their sentences violated their Sixth Amendment right to a jury trial because a judge, rather than a jury, determined the presence of aggravating circumstances. After the superior courts denied relief, each filed a petition for review with this court claiming various grounds for relief. We consolidated the petitioners' cases and granted review only on the issue of *Ring II*'s applicability to the petitioners' cases. We have jurisdiction under Article VI, Section 5.3 of the Arizona Constitution and Rule 32.9 of the Arizona Rules of Criminal Procedure.

II.

¶4 In *Ring II*, the United States Supreme Court held that Arizona's former capital sentencing scheme[2] violated a defendant's right to a jury trial under the Sixth Amendment because a judge, rather than a jury, found facts necessary to expose a defendant to a death sentence. 536 U.S. at ___, 122 S. Ct. at 2443. The Court declared that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at ___, 122 S. Ct. at 2432.[3] The petitioners request that this court vacate their death

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2. Arizona Revised Statutes (A.R.S.) § 13-703 (2001) *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

3. Recognizing that under Arizona law aggravating circumstances "operate as 'the functional equivalent of an element of a greater offense,'" the Court held that Arizona's capital sentencing scheme violates the Sixth Amendment. 536 U.S. at __, 122 S. Ct. at 2443 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 2365 n.19 (2000)). *Apprendi* held that a jury must find beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490, 120 S. Ct. at 2362-63. *Ring II* applies *Apprendi*'s (continued...)

sentences because a judge, rather than a jury, made the factual findings needed to establish aggravating circumstances.

¶5 The petitioners began these proceedings by filing a petition for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. Generally, Rule 32.2 precludes relief for claims that were raised or could have been raised at trial or on appeal, as is true of this argument. Ariz. R. Crim. P. 32.2. An exception exists, however, when "[t]here has been a significant change in the law that *if determined to apply to the defendant's case* would probably overturn the defendant's conviction or sentence." Ariz. R. Crim. P. 32.1.g (emphasis added). Accordingly, we must first determine whether the *Ring II* decision applies retroactively to the petitioners' sentences.

III.

¶6 Several principles have shaped the United States Supreme Court's retroactivity jurisprudence, which Arizona courts have adopted and follow. *State v. Slemmer*, 170 Ariz. 174, 181-82, 823 P.2d 41, 49 (1991) (deciding to adopt and to apply federal retroactivity analysis). New constitutional rules apply to cases on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S. Ct. 708, 713 (1987). The Constitution, however, neither forbids nor demands retroactive application of new rules to cases that have become final. Generally, under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989) (plurality), and *Allen v. Hardy*, 478 U.S. 255, 106 S. Ct. 2878 (1986) (per curiam), new constitutional rules do not apply retroactively.

A.

¶7 Determining whether a rule applies retroactively under the *Teague* framework involves a three-part analysis. *United States v. Sanders*, 247 F.3d 139, 146-47 (4th Cir. 2001). First, the court must determine whether the petitioner's case has become final. The second

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3. (...continued)
interpretation of the Sixth Amendment to Arizona's capital sentencing scheme.

step essentially involves two inquiries: Is the rule that the petitioner asserts a new rule, and is the new rule substantive or procedural? Petitioners whose cases have become final may seek the benefit of new substantive rules. *Bousley v. United States*, 523 U.S. 614, 620, 118 S. Ct. 1604, 1610 (1998) (explaining that *Teague* does not apply to substantive rules). A new constitutional rule of criminal procedure, however, usually does not apply retroactively to collateral proceedings. *Teague*, 489 U.S. at 310, 109 S. Ct. at 1075. Therefore, the court must finally determine whether the new rule fits within one of two narrow exceptions that permit retroactive application of a new rule of criminal procedure.

B.

¶8 A defendant's case becomes final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6, 107 S. Ct. at 712 n.6. The trial courts entered a judgment of conviction and a death sentence for each of these petitioners. This court affirmed each petitioner's death sentence on his automatic direct appeal. *Murray*, 194 Ariz. 373, 982 P.2d 1287; *Mann*, 188 Ariz. 220, 934 P.2d 784; *Towery*, 186 Ariz. 168, 920 P.2d 290; *McKinney*, 185 Ariz. 567, 917 P.2d 1214. The United States Supreme Court denied petitions for writs of certiorari filed by Mann, Towery, and Murray. *Mann v. Arizona,* 522 U.S. 895, 118 S. Ct. 238 (1997) (mem.); *Towery v. Arizona*, 519 U.S. 1128, 117 S. Ct. 985 (1997) (mem.); *Murray v. Arizona*, 519 U.S. 874, 117 S. Ct. 193 (1996) (mem.). McKinney did not seek review from the Supreme Court, and his time for doing so has expired. This court has issued the direct appeal mandate for each petitioner. Accordingly, each petitioner's case has become final.

C.

¶9 Because the petitioners' cases are final, we next examine whether *Ring II* announced a new rule and whether the rule is substantive or procedural. A new rule "breaks new ground or imposes

a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301, 109 S. Ct. at 1070. Stated differently, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* Clearly, the *Ring II* decision breaks new ground because it expressly overruled *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990). *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. In *Walton*, the Court rejected Walton's argument that the Sixth Amendment demands that a jury, rather than a judge, find the presence of aggravating circumstances and upheld Arizona's capital sentencing statute, the same statute as that struck down in *Ring II*. 497 U.S. at 647-49, 110 S. Ct. at 3054-55. Because *Walton* governed at the time the petitioners' cases became final, precedent obviously did not dictate the holding of *Ring II*. Moreover, *Ring II*'s holding that a jury must decide whether any aggravating circumstances exist also imposes a new burden on the state. Thus, we conclude that *Ring II* constitutes a new rule.

¶10 Because *Ring II* announced a new rule, determining whether it applies retroactively largely turns on whether *Ring II* established a substantive or procedural rule. *See Santana-Madera v. United States*, 260 F.3d 133, 138 (2d Cir. 2001). Substantive rules determine the meaning of a criminal statute. *See Bousley*, 523 U.S. at 620, 118 S. Ct. at 1610. Decisions announcing substantive rules often address the criminal significance of certain facts or the underlying prohibited conduct. *See Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002). In contrast, procedural decisions set forth fact-finding procedures to ensure a fair trial. *Sanders*, 247 F.3d at 147.

¶11 Petitioners assert that *Ring II* announced a substantive rule because it determined the essential elements of capital murder in Arizona. They argue that *Ring II* refined the definition of an element of capital offenses, which is unquestionably a substantive decision. We disagree. Although the Supreme Court recognized that Arizona's aggravating factors operate as the functional equivalent of an element of a greater offense, *Ring II* did not announce a substantive rule.

¶12 *Ring II* extends *Apprendi*'s interpretation of the Sixth Amendment to the capital context. 536 U.S. at __, 122 S. Ct. at 2432. The Supreme Court specifically described *Apprendi* as a procedural decision: "The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's *procedure* is." *Apprendi*, 530 U.S. at 475, 120 S. Ct. at 2354 (emphasis added). The Court explained that New Jersey's policy behind the hate crime sentence enhancement "has no . . . bearing on this *procedural* question," that is, whether the Sixth Amendment requires a jury to determine if the defendant committed the crime motivated by hate. *Id.* (emphasis added). Courts addressing *Apprendi*'s retroactivity effect consistently conclude that *Apprendi* announced a procedural rule. *E.g., Curtis*, 294 F.3d at 843; *McCoy v. United States*, 266 F.3d 1245, 1256 (11th Cir. 2001); *Sanders*, 247 F.3d at 147; *United States v. Richardson*, 214 F. Supp. 2d 844, 846 (N.D. Ill. 2002). Logic dictates that if *Apprendi* announced a procedural rule, then, by extension, *Ring II* did also. *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002) (explaining that the Tenth Circuit's conclusion "that *Apprendi* announced a rule of criminal procedure forecloses Cannon's argument that *Ring* [*II*] announced a substantive rule").

¶13 In addition, *Ring II* changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, *Ring II* altered *who* decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings.

D.

¶14 In the interest of finality, new rules of criminal procedure do not apply retroactively under the *Teague* framework unless (1) the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague*, 489 U.S. at 307, 109 S. Ct. at 1073 (internal quotation marks and citation omitted) or (2) the rule announced is a watershed rule of criminal

procedure that is "implicit in the concept of ordered liberty." *Id.* at 311, 109 S. Ct. at 1076 (internal quotation marks and citation omitted). Arizona courts are especially concerned with the finality of criminal cases because the Arizona Constitution requires courts to protect the rights of victims of crime by ensuring a "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art. II, § 2.1(A)(10).

¶15 *Ring II* clearly does not implicate the first *Teague* exception. "*Ring* [*II*] did not forbid either the criminalization of any conduct or the punishment in any way of any class of defendants." *Colwell v. Nevada*, 59 P.3d 463, 473 (Nev. 2002); *see also United States v. Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir. 2002) (stating that *Apprendi* does not implicate the first *Teague* exception); *Sanders*, 247 F.3d at 148 (same).

¶16 Accordingly, *Ring II* does not apply retroactively unless it falls under *Teague*'s second exception. Petitioners argue that *Ring II* announced a watershed rule of criminal procedure because requiring a jury to determine the existence of aggravating circumstances improves the accuracy of the trial. We disagree.

¶17 The *Teague* watershed exception actually requires two showings. First, "[i]nfringement of the rule must *seriously* diminish the likelihood of obtaining an accurate conviction." *Tyler v. Cain*, 533 U.S. 656, 665, 121 S. Ct. 2478, 2484 (2001) (internal quotation marks and citation omitted) (emphasis added). In addition, "the rule must alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Id. Ring II* does not satisfy either prong of the watershed exception.

¶18 To fall within the second *Teague* exception, *Ring II* must impose a "procedure[] without which the likelihood of an *accurate conviction* is seriously diminished." *Teague*, 489 U.S. at 313, 109 S. Ct. at 1077 (emphasis added). Requiring a jury to determine the existence of aggravating circumstances does not "increase[] the reliability of the guilt-innocence determination at all because" *Ring II*

does not affect a jury's determination of guilt or innocence. *United States v. Moss*, 252 F.3d 993, 999 (8th Cir. 2001) (concluding that *Apprendi* does not qualify under the second *Teague* exception). Rather, *Ring II* prohibits a validly convicted defendant from being exposed to the death penalty unless a jury finds the existence of certain aggravating circumstances. *See id.*

¶19 Moreover, we doubt that the pre-*Ring II* sentencing procedure *seriously* diminished the likelihood of a fair sentencing hearing. *Ring II* merely shifts the fact-finding duty from an impartial judge to an impartial jury. *See United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002) (concluding that *Apprendi* does not qualify under the second *Teague* exception); *Sanders*, 247 F.3d at 148 (same). We have no reason to believe that impartial juries will reach more accurate conclusions regarding the presence of aggravating circumstances than did an impartial judge. *See Illinois v. Gholston*, 772 N.E.2d 880, 886 (Ill. App. Ct. 2002) (concluding *Apprendi* is not retroactive and stating it is unlikely a jury would have a "substantially different interpretation of the brutal and heinous nature of the crimes committed than the circuit judge"); *see also Bilzerian v. United States*, 127 F.3d 237, 241 (2d Cir. 1997) (holding that *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995), which held that materiality is a jury question, is not retroactive); *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997)(same).

¶20 Even if *Ring II* seriously improved the reliability of a defendant's conviction, the decision still would not apply retroactively to final cases. To come within the purview of the second *Teague* exception, a rule "must not only improve accuracy, but also alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S. Ct. 2822, 2831 (1990) (explaining that preserving accuracy "looks only to half of" *Teague*'s second exception). Only a "small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty" reach this watershed magnitude. *Graham v. Collins*, 506 U.S. 461, 478, 113 S. Ct. 892, 903 (1993) (internal quotation marks and citation omitted). In other words, a rule "must

implicate the fundamental fairness of the trial." *Teague*, 489 U.S. at 312, 109 S. Ct. at 1076.

¶21 We agree with the Fifth Circuit Court of Appeals that "one can easily envision a system of 'ordered liberty' in which certain elements of a crime can or must be proved to a judge, not to the jury." *Shunk*, 113 F.3d at 37 (holding that *Gaudin* does not apply retroactively). Indeed, several Supreme Court opinions support the conclusion that the right to a jury determination on the existence of aggravating circumstances does not involve a procedure so "implicit in the concept of ordered liberty" as to constitute a watershed rule. *Teague*, 489 U.S. at 311, 109 S. Ct. at 1076.

¶22 In *Ring II*, the Court explained that "[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, *fairness*, or efficiency of potential factfinders." 536 U.S. at __, 122 S. Ct. at 2442 (emphasis added). Moreover, the Court declined to make *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968), retroactive. *DeStefano v. Woods*, 392 U.S. 631, 633, 88 S. Ct. 2093, 2095 (1968) (per curiam). *Duncan* held that the basic Sixth Amendment right to a jury trial applies to the states through the Fourteenth Amendment. 391 U.S. at 147-58, 88 S. Ct. at 1446-52. Although *DeStefano* preceded *Teague*, the Court's reasoning remains relevant under the *Teague* framework. The Court stated, "We would not assert, however, that every criminal trial – or any particular trial – held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." *DeStefano*, 392 U.S. at 634-35, 88 S. Ct. at 2095 (quoting *Duncan*, 391 U.S. at 158, 88 S. Ct. at 1452).

¶23 The Supreme Court's decision in *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999), further supports our conclusion that *Ring II* does not constitute a watershed rule of criminal procedure. A jury convicted Neder of violating various tax, mail, and fraud statutes. *Id.* at 6, 119 S. Ct. at 1832. The judge, however, did not instruct the jury on the element of materiality, and the judge actually made the necessary finding of materiality. *Id.* After Neder's conviction but before Neder's case became final, the Court held in *United States v. Gaudin*, 115 S. Ct. 2310, 515 U.S. 506 (1995), that a jury must determine the question of materiality. In *Neder*, the Supreme Court recognized that the judge's failure to instruct and submit the element to the jury violated the Sixth Amendment but held that the error was subject to a harmless error analysis. *Id.* at 8-15, 119 S. Ct. at 1833-37. Moreover, holding that the failure to submit an element to a jury did not constitute a structural error, the Court necessarily concluded that "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair." *Id.* at 9, 119 S. Ct. at 1833.

¶24 The petitioners' cases are similar to Neder's in that the judge did not submit the aggravating circumstance element to the jury. Consequently, it would be inconsistent with *Neder* to now find that *Ring II* is a watershed rule that "implicate[s] the fundamental fairness of the trial." *Teague*, 489 U.S. at 312, 109 S. Ct. at 1076; *see, e.g., Sanders*, 247 F.3d at 148-49 (relying on *Neder* to determine that *Apprendi* is not a watershed rule of criminal procedure); *United States v. Gibbs*, 125 F. Supp. 2d 700, 705-07 (E.D. Pa. 2000) (same).

¶25 The new rule of criminal procedure announced in *Ring II* thus does not meet either of the exceptions to *Teague*'s general rule that new rules do not apply retroactively to cases that have become final.

E.

¶26 Although most courts have adopted *Teague*'s plurality analysis to determine whether a new rule applies retroactively, Arizona also follows the analysis of *Allen v. Hardy*, 478 U.S. 255, 106 S. Ct. 2878 (1986) (per curiam). *Slemmer*, 170 Ariz. at 182-83, 823 P.2d at 49-50. Under the *Allen* framework, courts weigh three factors to determine if a rule applies retroactively to final cases: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 478 U.S. at 258, 106 S. Ct. at 2880 (quoting *Solem v. Stumes*, 465 U.S. 638, 643, 104 S. Ct. 1338, 1341 (1984)).

¶27 We regard *DeStefano* as particularly persuasive because the Court applied these same three factors to conclude that *Duncan*, which applied the Sixth Amendment right to a jury to the states through the Fourteenth Amendment, did not apply retroactively. *DeStefano*, 392 U.S. at 633-34, 88 S. Ct. at 2095-96. If the basic right to a jury trial does not apply retroactively, then a right to a jury determination of aggravating circumstances that function essentially as elements of a greater offense also does not apply retroactively.

¶28 With respect to the purpose the new rule serves, the Court explained, "[r]etroactive effect is 'appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials.'" *Allen*, 478 U.S. at 259, 106 S. Ct. at 2880 (quoting *Solem*, 465 U.S. at 643, 104 S. Ct. at 1342). We concluded in our preceding *Teague* analysis that the *Ring II* holding is not designed to improve accuracy. *See supra* ¶¶ 18-19. Thus, the first *Allen* factor does not support applying *Ring II* retroactively.

¶29 Similarly, the justice system's good faith reliance on *Walton v. Arizona* weighs against retroactivity. In *Walton*, the Court expressly approved of Arizona's system in which the judge, not the jury, determined the presence of aggravating circumstances. 497 U.S. at 647-49, 110 S. Ct. at 3054-55. Moreover, the Court reaffirmed *Walton*'s continued viability in *Apprendi*. 530 U.S. at 496-97, 120 S. Ct. at 2366. Certainly the Arizona justice system acted in good faith in applying the holding of *Walton* until the Court overruled its decade-old decision.

¶30 Finally, applying *Ring II* retroactively would greatly disrupt the administration of justice. As recognized previously, courts must protect a victim's rights by ensuring "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art. II, § 2.1(A)(10). Arizona has approximately ninety prisoners on death row whose cases have become final and who received a sentence based upon the aggravating circumstances found by the trial judge and affirmed on appeal. Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden

on Arizona's administration of justice. As in *DeStefano*, "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons" sentenced to death "by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S. at 634, 88 S. Ct. at 2095. Moreover, vacating those prisoners' sentences without substantial justification would violate this court's duty under the Victims' Bill of Rights. Accordingly, we conclude that *Ring II* does not apply retroactively under *Allen*.

IV.

¶31 For the foregoing reasons, we affirm each trial court's denial of post-conviction relief for the petitioners on the basis of *Ring II*.

_____

Ruth V. McGregor
Vice Chief Justice

CONCURRING:

_____

Charles E. Jones, Chief Justice

_____

Rebecca White Berch, Justice

_____

Michael D. Ryan, Justice

Feldman, Justice, specially concurring

¶32 I agree with the result and the analysis except insofar as the court relies on its interpretation of *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999). *See* opinion at ¶¶ 23-24.

_____

Stanley G. Feldman, Justice (Retired)

APPENDIX C

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JAN 12 1998

CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WARREN WESLEY SUMMERLIN,	)	No. CIV 86-584-PHX-ROS
	)	
Petitioner,	)	MEMORANDUM OF
	)	DECISION AND ORDER
vs.	)	
	)	
TERRY L. STEWART, et al.,[1]	)	
	)	
Respondents.	)	

Petitioner Warren Wesley Summerlin ("Petitioner") filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. The Petition raises thirteen claims. For reasons set forth herein, the Court finds that Petitioner is not entitled to federal habeas corpus relief.[2]

1. Terry L. Stewart, Director of the Arizona Department of Corrections, and Meg Savage, Warden of the Arizona State Prison, Florence Complex, are substituted pursuant to F.R.C.P. 25(D)(1).

FACTUAL BACKGROUND

In the early morning of April 29, 1981, Brenna Bailey, a branch representative for Finance America in Tempe, Arizona, left her office to visit the residence of Dora Summerlin, Petitioner's wife. Finance America had lent money for a piano to Mrs. Summerlin, and the account was delinquent. Ordinarily, upon completing such a visit, Bailey would call her office supervisor. When she failed to do so or to come back into the office, he became concerned, telephoned her boyfriend Marvin Rigsby, and gave him the address of the home Bailey was supposed to visit.

Around 5:00 p.m., Rigsby arrived at the Summerlin residence. He spoke with Petitioner, who stated that Bailey had been there but had left by 10:30 a.m. Unable to find his girlfriend, Rigsby called the police. That same evening, an anonymous caller reported that a missing "Pacific Finance" woman had been killed by a man named Warren Summerlin. The female caller told police that Summerlin had placed a rolled piece of carpet that appeared to contain a body into the trunk of his car. The caller was later identified as Petitioner's mother-in-law.

The next morning, Bailey's car was found in a parking lot located approximately one mile from Petitioner's home. A pair of women's panties, pantyhose, and shoes could be seen on the back floorboard. Detectives forced open the trunk and discovered the victim's partially-nude body alongside a crumpled bedspread soaked in blood. Her skull appeared crushed. Within the bedspread's lining, they found, among other things, green carpet tufts and pieces of spongy material.

2. In accordance with the United States Supreme Court's decision in Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059 (1997), this Court has not applied the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to this case.

Later that day, police officers executed a search warrant at Petitioner's home. They took samples of carpeting and carpet padding and seized various blood-spattered items. When a detective read the warrant to Petitioner, Petitioner stated, "I didn't kill nobody." The detective did not respond, and Petitioner asked, "Is this in reference to the girl that was at my house?" The detective replied, "What girl?", and Petitioner described the woman who had been at his home regarding his wife's piano. Shortly thereafter, Mrs. Summerlin positively identified the bedspread, and Petitioner was arrested. At the police station, Petitioner asked to speak with his wife and, in the presence of police officers, proceeded to make several incriminating statements.

PROCEDURAL HISTORY

On June 8, 1982, a jury convicted Petitioner of first degree murder and sexual assault. He was sentenced to death for the murder and to a 28-year prison term for the assault. On direct appeal, the Arizona Supreme Court affirmed Petitioner's convictions and sentences. State v. Summerlin, 138 Ariz. 426, 675 P.2d 686 (1983).

On March 6, 1984, Petitioner filed his first petition for post-conviction relief in state court and amended the petition on October 12, 1984. Following an evidentiary hearing on January 28, 29, and 30, 1985, the superior court denied the petition and subsequently denied a motion for rehearing. On October 1, 1985, the Arizona Supreme Court denied review. One justice dissented, stating that he would have reduced Petitioner's sentence to life imprisonment.

Petitioner filed a Petition for Writ of Habeas Corpus in this Court on April 11, 1986, and an amended petition on June 30, 1986. The Court stayed the proceedings pending the exhaustion of Petitioner's claims in state court.

On January 20, 1987, Petitioner filed his second petition for post-conviction relief in state court. The superior court summarily denied the petition on April 29, 1987, finding its only claim without merit and precluded for failure to raise it in a timely manner. The court

also denied a motion for rehearing. No petition for review was filed with the Arizona Supreme Court.

Petitioner's third petition for post-conviction relief was filed on May 11, 1988. The superior court summarily denied the petition on June 23, 1988, finding the claims precluded or waived. Thereafter, the court denied a motion for rehearing, the Arizona Supreme Court denied review, and the United States Supreme Court denied certiorari.

On July 17, 1991, Petitioner filed his fourth petition for post-conviction relief, which was amended on October 17, 1991. The superior court summarily dismissed the petition on November 19, 1991, and later dismissed a motion for rehearing. The Arizona Supreme Court denied review, and the United States Supreme Court denied certiorari.

The stay of proceedings in this Court was lifted on January 27, 1995. On November 22, 1995, Petitioner filed a Second Amended Petition for Writ of Habeas Corpus ("Petition"). Respondents filed an Answer requesting summary dismissal, and Petitioner filed a Response.

CLAIMS DECIDED ON THE MERITS

In his Petition, Petitioner raises thirteen claims for relief. (File doc. 106.)[3] Respondents contend that all but Claims 1.1, 1.2, 1.3, and 2 are procedurally defaulted. (File doc. 117 at 7-12.) As discussed infra at pages 32-35, the Court disagrees. Therefore, all of Petitioner's claims are decided on the merits.

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3. "File doc." refers to documents in this Court's file. Exhibits A through Y are the exhibits to Respondents' Notice of Filing of State Court Record. (File doc. 17.) Exhibits AA through ZZ, AAA through MMM, and AAAA through HHHH are the exhibits submitted by Petitioner in support of his Second Amended Petition. (File doc. 106.) Exhibits AAAA through HHHH were previously stricken by order of this Court and were not considered in the determination of this matter. (See File doc. 128.) "R.O.A." refers to the state court record on appeal. "R.T." refers to the reporter's transcripts. "M.E." refers to minute entries of the state court.

Claim 1.1: Petitioner was Denied Effective Assistance of Counsel at the Withdrawal of Plea Proceeding

Petitioner contends that misconduct of his counsel, Maria Regina (now Brandon), and the prosecutor, Vincent Imbordino, violated his Sixth Amendment right to effective assistance of counsel. (File doc. 107 at 13-22.) He bases his claim on the fact that Regina and Imbordino had a one-night romantic encounter four days prior to Petitioner's withdrawal from a favorable plea agreement. (Ex. W: R.T. 1/28/85 at 117, 192.) Petitioner alleges that the affair created a conflict of interest for Regina and resulted in her improperly allowing him to withdraw from a plea to second degree murder. For the reasons discussed below, the Court finds that Petitioner did not receive ineffective assistance of counsel.

The Sixth Amendment right to counsel includes the right to counsel free from divided loyalty. Bonin v. Calderon, 59 F.3d 815, 825 (9th Cir. 1995), cert. denied, 116 S. Ct. 718 (1996) (citing Wood v. Georgia, 450 U.S. 261, 272, 101 S. Ct. 1097, 1104 (1981)). To prevail on a claim of ineffectiveness based on a lawyer's conflict of interest, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). This is a two-prong inquiry. First, a petitioner must prove an actual, not merely possible or theoretical, conflict. See Bonin, 59 F.3d at 826-27; Morris v. California, 966 F.2d 448, 455 (9th Cir. 1991). Second, a petitioner must show "that some [adverse] effect on counsel's handling of particular aspects of the trial was 'likely'." United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992) (citing Mannhalt v. Reed, 847 F.2d 576, 583 (9th Cir. 1988)). In the present case, the Court need not decide whether there was an "actual" conflict because Petitioner has

failed to establish the second prong–that counsel's representation was adversely affected by the alleged conflict.[4]

On November 17, 1981, Petitioner entered into a plea agreement in which he agreed to plead guilty to second degree murder in this case and to aggravated assault in an unrelated case. The agreement specified that he would be sentenced to the maximum 21 years for the murder and to the maximum 15 years for the assault, the terms to run concurrently with each other and with a sentence for a probation violation. (Ex. Y, vol. 1: R.O.A. 29; Ex. G: R.T. 11/18/81 at 3-4, 11.) The next day, at the initial change of plea hearing, Judge Derickson discussed with Petitioner the provisions of the plea agreement and its consequences. The court also explained to Petitioner that it wanted to review the record and presentence report before deciding whether to accept the plea agreement and that Petitioner would have an opportunity to withdraw from the plea if the court rejected the stipulation for concurrent sentences. (Ex. G: R.T. 11/18/81 at 11, 14.) After Petitioner's counsel recited in detail the evidence that the state would produce at trial, the judge addressed Petitioner:

> THE COURT: The original charge is first degree murder. Are you aware of the possible punishments that are available to the Court?

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4. Respondents argue that Cuyler is inapplicable to the type of conflict alleged here (i.e., a personal loyalty issue). (File doc. 117 at 13-16.) Relying on the Fifth Circuit's decision in Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995), they assert that Cuyler is limited to conflicts arising out of multiple or successive representation and that the more rigorous Strickland standard (deficient performance and resulting prejudice) must be met to prevail on this claim. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). It is unnecessary for this Court to determine whether the conflict at issue here is of the type contemplated in Cuyler because Petitioner has failed to show that his counsel's representation was adversely affected by it, let alone that the representation was deficient. Nonetheless, the Court notes that the Ninth Circuit has routinely applied Cuyler to non-multiple representation conflicts. See Bonin, 59 F.3d at 825 (listing such cases); see also Spreitzer v. Peters, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997) (declining to follow Beets).

A. Yes.

Q. What?

A. Umm, gas chair, 25 to life, or natural life, by law, for first degree murder.

THE COURT: Two alternatives: one is the death penalty.

THE DEFENDANT: Yes, sir.

THE COURT: The second is life imprisonment, without the possibility for parole for 25 actual calendar years. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: With respect to the murder charge, do you believe that, because of the evidence that the State has and that it's going to present against you, that you would likely be convicted in front of a jury and, if you were convicted, you would probably suffer a greater penalty than that which is called for in this plea agreement?

THE DEFENDANT: Yes.

(Id. at 17-18.) Judge Derickson entered Petitioner's guilty pleas but deferred acceptance of the pleas until December 18, 1981, the date set for entry of judgment of guilt and sentencing. (Ex. X: M.E. 11/18/81.)

Prior to the scheduled sentencing hearing, Petitioner filed a pro per motion to withdraw from the plea agreement and a motion for substitution of counsel. (Ex. H: R.T. 12/15/81.) A hearing on the motions was held on December 15, 1981. Petitioner explained that he had just received a psychiatric evaluation report and wanted to

withdraw from the plea agreement because it did not provide for him to receive psychiatric counseling. As for the motion to substitute counsel, he told the judge that he wanted to go "the medical way" and felt that the Public Defender's Office was too overloaded with cases to adequately investigate on his behalf. He further stated, "I've been telling Maria Regina, for a long time, I didn't want to accept the plea agreement and I feel I was coached into accepting a plea agreement . . . ." (Id. at 7.) The following exchange then occurred:

THE COURT: . . . . I don't think you've set forth sufficient grounds, in your pleadings, to require a withdrawal of the plea of guilty, because I think we set forth all of the–we went through a long proceeding on November 18 about whether this was your voluntary choice to plead guilty. I told you at the time that, if I couldn't, in good conscience, accept the plea agreement on the basis that was set forth–that being the stipulation that you receive concurrent time–that I would give you an opportunity to withdraw from the plea agreement.

. . . I can tell you that I am not going to accept the stipulation on the sentence.

Although today is not the sentencing date, you should be well aware that, on that ground, you have a right to withdraw from your plea of guilty and this matter can be set for trial to a jury on the various charges that are pending against you.

THE DEFENDANT: So, you're saying, on the 18th, if I want to withdraw from the plea agreement, I can? Is that what you're saying?

MS. REGINA: What he's saying is that he's not going to give you the 21 years. He wants to give you more than that. So you can either go with what he gives you more than that or get out of the plea and go to trial.

(Id. at 8-9.) The judge subsequently denied both motions.

Thereafter, in an attempt to salvage the plea agreement, Regina filed a motion for change of judge on the ground that Judge Derickson was biased and prejudiced against Petitioner. (Ex. W: R.T. 1/28/85 at 114-15.) The motion was argued before Judge Broomfield on December 18, 1981, and denied. (Ex. X: M.E. 12/18/81.) Later that same day, Regina and prosecutor Imbordino engaged in a one-night affair. As a result, Regina believed she should not continue to represent Petitioner, especially since Petitioner had indicated that he wanted to go to trial. (Ex. W: R.T. 1/28/85 at 117.) Although she discussed the dilemma with colleagues at work, neither she nor Imbordino informed the judge or Petitioner. (Id. at 118-20.)

Four days later, Regina appeared with Petitioner at the rescheduled sentencing hearing before Judge Derickson. (Ex. X: M.E. 12/22/81; Ex. I: R.T. 12/22/81.) The judge again informed Petitioner that he would not accept concurrent sentences and that if Petitioner still wanted to plead guilty to second degree murder and aggravated assault, he could be sentenced up to a maximum of 38-1/2 years. Petitioner stated that he wanted to withdraw from the plea agreement, and the judge reinstated his pleas of not guilty. Petitioner also made another motion for new counsel, which was denied. (Ex. I: R.T. 12/22/81 at 9.) Thereafter, the case was transferred to Judge Riddel for trial. (Ex. X: M.E. 12/24/81.)

On December 28, 1981, Regina had arranged for a hearing before Judge McCarthy (standing in for Judge Riddel) at which she intended to move to withdraw as counsel. (Ex. W: R.T. 1/28/85 at 121-22, 133-34.) However, the judge began the hearing by asking Petitioner about his dissatisfaction with counsel. (Ex. Y, vol. 2: R.O.A. 134: App. 6: R.T. 12/28/81 at 2.) Petitioner responded that he suspected the Public Defender's Office was being pressured by the victim's employer and by a newspaper. Judge McCarthy then agreed to appoint George Klink, a private practitioner, as new counsel. (Id.) At that point, Regina decided not to mention her reason for wanting to withdraw since she had already been removed from the case. (Ex. W: R.T. 1/28/85 at

123, 134.) Subsequently, the matter was reassigned to Judge Marquardt, who ultimately presided over Petitioner's trial.

Before this Court, Petitioner argues that the Imbordino affair adversely affected Regina's representation because she did not advise Petitioner of the danger of withdrawing his plea to second degree murder and failed to try to persuade him not to do so. (File doc. 107 at 16; File doc. 120 at 8.) The record belies Petitioner's claim. At the post-conviction evidentiary hearing in state court, Petitioner testified that he had wanted Regina removed from his case because she "did not want to go the medical defense way" and instead kept pushing him into the plea agreement.[5] (Ex. W: R.T. 1/28/85 at 210-11; see also Ex. H: R.T. 12/15/81 at 7.) Petitioner clearly understood the consequences of withdrawing from the plea and proceeding to trial, which was what he had sought to do, unsuccessfully, at the December 15 hearing. (See Ex. G: R.T. 11/18/81 at 17-18.) Once Judge Derickson indicated that he was going to reject the concurrent sentences provision and give Petitioner an opportunity to withdraw from the plea at the upcoming hearing, there was little doubt that Petitioner would do so. (See Ex. H: R.T. 12/15/81 at 8-9; Ex. W: R.T. 1/28/85 at 117; Ex. I: R.T. 12/22/81 at 8.) This is confirmed by Petitioner's substitute counsel George Klink who testified that Petitioner was unwilling to enter any plea agreement. (Ex. W: R.T. 1/28/85 at 151, 171.) While counsel's conduct with Imbordino on December 18, 1981, was an unfortunate occurrence, Petitioner has failed to present any evidence that it affected Regina's performance at the December 22 withdrawal of plea hearing. Habeas relief for this claim is therefore denied.

Claim 1.2: Petitioner was Denied Effective Assistance of Counsel at Trial

Claim 1.3: Petitioner was Denied Effective Assistance of Counsel at Sentencing

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5. Petitioner explained that he wanted to go to trial so that doctors could testify to his mental problems. (Ex. W: R.T. 1/28/85 at 210-11.)

Petitioner contends that counsel George Klink was ineffective at trial for failing to assert potential psychiatric defenses. Petitioner also challenges Klink's effectiveness at sentencing, claiming he failed to present substantial mitigating evidence.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. Id. at 688-89, 104 S. Ct. at 2065. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. Regarding prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068.

In June 1981, prior to Klink's assignment as defense counsel, Petitioner was examined by two court-appointed psychiatrists, Drs. Maier Tuchler and Otto Bendheim, pursuant to Rule 11 of the Arizona Rules of Criminal Procedure. Each found him competent to stand trial and legally sane under the M'Naghten standard. (Ex. F: R.T. 7/21/81 at 4-5.) Although there was no evidence of mental disease or defect, Dr. Tuchler observed that dyslexia and illiteracy made Petitioner "functionally mentally retarded." (Ex. W: R.T. 1/28/85 at 6.) He further found that Petitioner's impulse control was extremely impaired due to an explosive-type personality disorder and that Petitioner had an anti-social personality. (Id.)

Around this same time, Dr. Leonardo Garcia-Bunuel, a psychiatrist who treated Petitioner at the Maricopa County Jail, contacted defense counsel Regina regarding a possible diagnosis of psychomotor epilepsy. Petitioner had described to Dr. Garcia-Bunuel details of the murder, particularly experiencing an intense perfume

odor, and this led Dr. Garcia-Bunuel to suspect that Petitioner may have had a temporal lobe seizure at the time of the killing. (Id. at 46-48.) Subsequently, in August 1981, Regina arranged for neurological testing by Dr. Mark Winegard. An electroencephalogram (EEG) showed some slowing in Petitioner's posterior temporal area, but was insufficient to support a diagnosis of epilepsy. CAT scans and a second EEG performed in October 1981 were normal. As a result, Dr. Garcia-Bunuel withdrew his concerns. (Id. at 131.)

Regina also secured a psychological evaluation of Petitioner from Dr. Donald Tatro in November 1981. Although concluding there was no evidence to support an insanity defense, Dr. Tatro found indications of an organic brain impairment, borderline personality disorder, and paranoid personality disorder. (Ex. Y, vol. 1: R.O.A. 95 at T2.)[6] In his opinion, Petitioner "is deeply emotionally and mentally disturbed, unaware of the motives underlying much of his behavior, and unable, because of his problems, to exercise normal restraint and control, once his highly unstable and volatile emotions are aroused." (Id.)

Ineffective Assistance at Trial

Petitioner argues that Klink's representation during trial was constitutionally deficient because he failed to independently investigate potential psychiatric defenses and failed to follow up on, or utilize, psychiatric evidence already available to him. (File doc. 107 at 23-24.) According to Petitioner, once Klink determined that Petitioner was not M'Naghten insane, he "never really considered mounting a 'state of mind' diminished capacity defense at trial in order to reduce the level

6. Because the copy of Dr. Tatro's report found in Exhibit Y is illegible in places, the Court obtained a more readable copy from the Clerk of the Maricopa County Superior Court which is filed as an exhibit concurrently with the present Order.

of offense by negating *mens rea* . . . ."[7] (File doc. 120 at 12.) Specifically, he says Klink should have presented evidence of psychomotor epilepsy and of his impulsive personality to show that the killing was not premeditated.

A. Psychomotor Epilepsy

Previous counsel Regina thoroughly investigated Dr. Garcia-Bunuel's suspicion of epilepsy. She obtained neurological testing and pursued this possible diagnosis with Dr. Bendheim, as revealed in the following letter the doctor sent to Judge Derickson in December 1981:

> We again discussed the possibility of psychomotor epilepsy, especially in view of Dr. Garcia-Bunuel's findings that this man had very vivid olfactory (smell) hallucinations preceding outbursts. I went over this whole situation again and told Miss Regina that the neurologists have been unable to find psychomotor epilepsy, although there was some slowing of the wave patterns in the temporal lobes, where psychomotor epileptic attacks usually originate.
>
> While a positive electroencephalogram, which was not obtained here, would make a positive diagnosis, an essentially negative EEG does not entirely rule out the possibility of epileptic-type seizures, and for this reason I see absolutely no harm and potentially quite a bit of benefit to place this defendant on anti-epileptic, anti-seizure type medication, even though the diagnosis has not been established.

(Ex. Y, vol. 1: R.O.A. 95 at Q2.)

During post-conviction hearings, Regina testified that she met with trial counsel Klink on two or three occasions and spent a number of hours discussing her investigative efforts, including a possible insanity defense. (Ex. W: R.T. 1/28/85 at 132.) She stated that she discussed this aspect of the case with Klink "in depth," including the examinations and conclusions of all five doctors. (Id.) Klink testified that after consulting with Regina he made a tactical decision to not pursue an insanity defense due to the lack of evidence. (Id. at 176.) As for the possible diagnosis of psychomotor epilepsy, Klink did not follow up on Dr. Garcia-Bunuel's earlier suspicion because the doctor had changed his opinion and was out of the country at the time of trial. (Id. at 175.)

In assessing an attorney's performance, a reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

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7. The Court observes that Arizona has long rejected the affirmative defense of diminished capacity. State v. Mott, 187 Ariz. 536, 540-41, 931 P.2d 1046, 1050-51, cert. denied, 117 S. Ct. 1832 (1997) (citing State v. Schantz, 98 Ariz. 200, 212-13, 403 P.2d 521, 529 (1965)); but see A.R.S. § 13–703(G)(1) (proof of diminished capacity as a mitigating circumstance for sentencing). The practical effect being that a defendant cannot, during trial, put forth evidence of mental disease or defect to show that he or she was incapable of forming a requisite mental state for the charged offense. Mott, 187 Ariz. at 540, 931 P.2d at 1050; Schantz, 98 Ariz. at 213, 403 P.2d at 529. However, evidence of a defendant's character trait of impulsivity does not fall into this prohibited category. Mott, 187 Ariz. at 543-44, 931 P.2d at 1053-54; State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981).

In State v. Christensen, the defendant sought, pursuant to Rule 404(a)(1) of the Arizona Rules of Evidence, admission of expert testimony regarding his tendency to act without reflection. The Arizona Supreme Court held that it was error to exclude such testimony because "establishment of [this character trait] tends to establish that appellant acted impulsively. From such a fact, the jury could have concluded that he did not premeditate the homicide." Id. at 35, 628 P.2d at 583. The holding was limited, however, in that the expert could not testify to whether the defendant was acting impulsively at the time of the offense. Id. at 35-36, 628 P.2d at 583-84.

In his Petition, Petitioner appears to confuse a "diminished capacity" affirmative defense with a strategy of presenting character trait evidence to negate premeditation. Nevertheless, he refers to Christensen in his Response, and counsel argued the applicability of that case during the post-conviction hearing in state court. (See File doc. 120 at 17; Ex. W: R.T. 1/28/85 at 219.) The Court therefore assumes that Petitioner's claims of ineffectiveness relate to counsel's failure to present evidence of impulsivity rather than the failure to pursue an affirmative defense unrecognized in Arizona.

evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Having reviewed the entirety of the record, the Court finds that Klink's performance was reasonable under the circumstances. In deciding whether to pursue evidence of Petitioner's mental state, Klink was entitled to rely on the opinions of the mental health experts who had already examined Petitioner. Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995). At the time, none of the doctors, including Dr. Garcia-Bunuel, were able to positively diagnose Petitioner as suffering from psychomotor epilepsy. It was thus reasonable for Klink not to investigate this possibility further. Likewise, in view of the doctors' inability to make a diagnosis, Klink's decision to forgo presenting what little evidence he had of epilepsy was certainly within the "wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see Harris v. Vasquez, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is also acceptable trial strategy to choose not to call psychiatrists to testify when they can be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion."). The Court thus denies habeas relief for this claim.

B. Impulsivity

At trial, counsel's main defense theory was lack of premeditation. Klink argued to the jury that the killing may have been the result of a "violent, sudden reaction" to Brenna Bailey's visit to collect on an overdue bill. (Ex. S: R.T. 6/8/82 at 40.) Yet, he presented no evidence to support this theory, despite having the reports of Drs. Tuchler and Tatro which described Petitioner's impulsive personality and which would have been admissible under State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). See supra note 7; Vickers v. Ricketts, 798 F.2d 369, 372 (9th Cir. 1986) ("The Arizona Supreme Court has held that the tendency to act on impulse is probative of an absence of premeditation.") (citing Christensen). At the evidentiary hearing in state court, Klink was not asked why he failed to present this evidence or whether he was even cognizant of the Christensen decision, which had been handed down more than a year before Petitioner's trial. Nonetheless, even assuming for the sake of argument that Klink's

representation in this regard was deficient, Petitioner has failed to establish prejudice.

The trial court instructed the jury on both first and second degree murder and explained that a finding of premeditation differentiated the former from the latter. (Ex. S: R.T. 6/8/82 at 64.) "To prove premeditation, the state was required to show only that [the defendant] had had time to reflect after forming the intent to kill; any length of time would have been sufficient, even if it was 'as instantaneous as [the time] it takes to form successive thoughts in the mind.'" Clabourne v. Lewis, 64 F.3d 1373, 1380 (9th Cir. 1995) (citing State v. Neal, 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984). In its closing argument, the State asserted that evidence of sexual assault established premeditation because Petitioner would have had to get up after assaulting the victim to retrieve the hard, blunt object used to fracture her skull."[8] (Ex. S: R.T. 6/8/92 at 19.) The prosecutor also emphasized that the number of blows to the victim's head showed that Petitioner had had time to reflect on his actions. (Id.)

After careful review of the record, the Court finds that there is no reasonable probability the jury would have acquitted Petitioner of first degree murder had Klink introduced evidence of Petitioner's impulsive personality. The doctors would not have been allowed to testify that Petitioner was acting impulsively at the time of the murder. The testimony would have been limited to a general description of Petitioner's behavioral tendencies and thus would have had only marginal probative value in determining whether Petitioner lacked premeditation at the time of the offense. See Christensen, 129 Ariz. at 35-36, 628 P.2d at 583-84. In addition, the State presented considerable evidence of sexual assault,[9] and the jury found Petitioner guilty on that

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8. Although the murder weapon was never recovered, Petitioner confessed to Dr. Tatro that he had struck the victim with a hatchet. (Ex. W: R.T. 1/28/85 at 74-75.)

9. The victim's underwear and pantyhose, torn and spattered with blood, were found in the backseat of her car, along with her shoes. (Ex. P: R.T. 6/2/82 at 154.)
(continued...)

charge. Furthermore, uncontroverted testimony established that the victim had been hit repeatedly and forcefully on different sides of her head.[10] Petitioner's "excessive and purposeful actions demonstrate more than just a 'reactionary' homicide." State v. Summerlin, 138 Ariz. at 434, 675 P.2d at 694. Cf. State v. Lopez, 158 Ariz. 258, 263, 762 P.2d 545, 550 (1988) (nature, severity, and placement of injuries, several of which would have individually caused death, demonstrated premeditation); State v. Sellers, 106 Ariz. 315, 316, 475 P.2d 722, 723 (1970) (same). Habeas relief is denied.

Ineffective Assistance at Sentencing

Petitioner also asserts that Klink was ineffective at sentencing for failing to investigate and present evidence of Petitioner's social and psychological history, including an incapacity to conform his conduct to the law's requirements. (File doc. 107 at 27-31.) The Court disagrees.

During the aggravation/mitigation hearing, Klink called Dr. Tatro as the sole mitigation witness. The following then occurred:

THE COURT: All right. Come forward and be sworn, please.

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9. (...continued)
When police discovered the body, Bailey's dress and slip were pulled up to her mid-section and she was nude from the waist down. (Id. at 166-67.) In addition, one detective observed a milky substance, which appeared to him to be seminal fluid, around her genitals. (Id. at 176, 178.) Later testing of a vaginal swab confirmed the presence of seminal fluid, and other evidence effectively eliminated Bailey's boyfriend as the source. (Id. at 114; Ex. R: R.T. 6/7/82 at 88-95, 133-36, 153-56.)

10. The medical examiner who performed the autopsy testified that there were at least five lacerations on Bailey's scalp, with some appearing to be compound (i.e., more than one blow to the same area). (Ex. R: R.T. 6/7/82 at 156.) These injuries were located all over the victim's head–on the right forehead, behind the left ear, on the top, and on the back. (Id. at 158-59.) The medical examiner further testified that several of the blows individually would have been fatal. (Id. at 163.) Additionally, there was a defensive wound on the back of the victim's right hand, indicating that she probably tried to protect her head during the assault. (Id. at 161-62.)

Your client wants to ask a question.

MR. KLINK: Well, your honor, may we approach the bench?

THE COURT: All right.

(An off the record discussion at the bench ensued, outside the hearing of the court reporter.)

THE COURT: At the request of defense counsel and his client, the client would like to have a couple of minutes to talk over the calling of this witness.

. . . .

MR KLINK: All right, your honor. With the consent of the defendant, the defendant has no witnesses in mitigation at this time and -

THE COURT: This will be -

MR. KLINK: - and we'll rest.

. . . .

MS. GIFFORD: Your honor, it's my understanding - at least my impression - that this is the defendant's decision that he does not wish certain witnesses to be called. Could we have that reflected on the record, perhaps, because -

THE COURT: I think it has been, and Mr. Summerlin, I'll address you directly, to make sure that–for any error that might possibly be claimed at this time–to make sure that you understand that you are facing a potential decision between either life

imprisonment or the death penalty, and this is the time in which you must decide whether you present any mitigation witnesses on your behalf.

This is your entitlement. Your lawyer has told me that at this time you do not wish to, and he is telling me that you do not wish to call any mitigation witnesses. If this is correct I'll accept your decision.

But I want it to be very clear that this is the time, and only time, that you'll be able to have to do this.

So you don't even need to respond to me. You understand what I'm telling you?

THE DEFENDANT: Yes.

(Ex. T: R.T. 7/8/82 at 7-10; emphasis added.) Defense counsel subsequently clarified that Petitioner wished to rely on Dr. Tatro's evaluation, which had been appended to the presentence report. Thereafter, the State called Drs. Bendheim and Tuchler as rebuttal witnesses.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. At the post-conviction evidentiary hearing, Klink testified that he could not remember the substance of his consultation with Petitioner during the aggravation/mitigation hearing or why Dr. Tatro was not utilized as a witness. (Ex. W: R.T. 1/28/85 at 182–83.) Nevertheless, it is clear from the record that it was Petitioner who did not want the doctor to testify.[11]

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11. In light of Petitioner's detailed confession to Dr. Tatro, it is possible Petitioner preferred submission of the doctor's report, which had been redacted in an apparent effort to remove any reference to the confession, to the risk of a potentially (continued...)

Furthermore, this is not a case in which counsel, on notice that his client may be mentally impaired, failed altogether to investigate and present evidence of his client's mental condition. See Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995); Deutscher v. Whitley, 884 F.2d 1152, 1159 (9th Cir. 1989), vacated on other grounds, 500 U.S. 901, 111 S. Ct. 1678 (1991); Evans v. Lewis, 855 F.2d 631, 636–37 (9th Cir. 1988). Here, Klink put forth evidence that in his view showed that Petitioner's capacity to conform his conduct to the requirements of law was substantially impaired. See A.R.S. § 13-703(G)(1). (Ex. W: R.T. 1/28/85 at 181.) Specifically, the sentencing court was informed, via Dr. Tatro's report, that Petitioner's emotionally and mentally disturbed condition contributed to an inability to control his behavior. (Ex. Y, vol. 1: R.O.A. 95 at T2.) In addition, on cross-examination, Klink elicited from Dr. Tuchler the opinion that Petitioner could lose control if his explosive personality was triggered. (Ex. T: R.T. 7/8/82 at 23–24.) That neither the sentencing court nor the Arizona Supreme Court found this evidence sufficient to establish the diminished capacity mitigating factor has no bearing on the reasonableness of counsel's performance.

Petitioner has also failed to establish that he was prejudiced as a result of Klink's allegedly deficient representation at sentencing. Significantly, Petitioner does not point to any evidence of his mental condition that should have been submitted other than the possibility he suffered a psychomotor epileptic seizure at the time of the killing. However, as discussed previously, counsel's decision to forgo further pursuit of such evidence was reasonable under the circumstances. At that time, none of the experts were able to positively diagnose Petitioner as suffering from psychomotor epilepsy, and Klink was entitled to rely on their opinions. See Dyer v. Calderon, 122 F.3d 720, 736 (9th Cir. 1997); Hendricks, 70 F.3d at 1038. Even at the post-conviction evidentiary hearing. Dr. Garcia-Bunuel could not affirmatively opine whether Petitioner had experienced an epileptic

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11. (...continued)
damaging cross-examination.

seizure at the time of the killing.[12] Moreover, this possible diagnosis was brought to the sentencing court's attention through Klink's cross-examination of Dr. Bendheim during the aggravation/mitigation hearing. (Ex. T: R.T. 7/8/82 at 17–19.)

As for Klink's failure to interview Petitioner's family members or otherwise investigate Petitioner's background, Petitioner has again failed to establish that such efforts would have changed the sentencing outcome. The state court conducted a full and fair fact-finding hearing into this claim of ineffective assistance of counsel.[13] Yet, Petitioner produced no new mitigating evidence. In addition, much of the information Petitioner now claims was never presented in mitigation was in fact contained in Dr. Tatro's report, including Petitioner's learning disabilities and organic brain dysfunction, as well as his troubled childhood and feelings of being unloved and unwanted by his mother. (See Ex. Y, vol. 1: R.O.A. 95 at T2–Z2.) Thus, even assuming Klink's failure to investigate Petitioner's social history fell

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12. Dr. Garcia-Bunuel testified as follows:

> Mr. Summerlin may claim that he never sexually assaulted the victim that he killed. If Mr. Summerlin is telling the truth in that respect, then my answer to the question would be, essentially, unqualified yes, he almost certainly acted as a result of the temporal lobe seizure.
>
> If Mr. Summerlin is not telling the truth—did not tell me the truth and, in fact—and I have no way of establishing that—did sexually assault the victim prior to the killing, then my answer would be that it was not very likely he had a temporal lobe seizure at that time
>
> . . . .
>
> . . .
>
> Clearly, one would have to assume that if there was a sexual assault the victim would have resisted, it would not have lasted a fraction of a second, and it would have been terminated. The murder that followed would have had a different motivation and cause then.

(Ex. W: R.T. 1/28/85 at 57–58.)

13. The Court made this finding in its July 18, 1996 Order granting Respondents' Motion to Strike Petitioner's Exhibits AAAA through HHHH. (See File doc. 128.)

outside the wide range of reasonable assistance, Petitioner has not met his burden of proving prejudice. Petitioner is not entitled to habeas relief.

Claim 1.4: Cumulative Errors of Counsel Prejudiced Petitioner.

Petitioner next asserts that the combined impact of alleged deficiencies in counsel's representation prejudiced his defense. As already discussed, however, Petitioner has failed to show, in most of his ineffective-assistance-of-counsel claims, that counsel's performance was deficient, let alone prejudicial. This claim is therefore denied. Cf. Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) (petitioner prejudiced by cumulative impact of eleven deficiencies, eight of which were undisputed).

Claim 2: Petitioner's Due Process Rights were Violated by the Trial Court's Incompetence/Impairment

In 1991, Judge Marquardt pled guilty to a felony involving marijuana and admitted suffering from an addiction to the drug. Petitioner contends that this admitted drug use establishes Judge Marquardt was incompetent to preside over Petitioner's pre-trial, trial, sentencing, and post-conviction proceedings.[14] (File doc. 107 at 33–67.) Although he points to several passages in the record that in his view evidence impairment, Petitioner urges the Court to look beyond the record, conduct an evidentiary hearing into the extent of Judge Marquardt's drug dependency, and evaluate this claim as if it were one of judicial bias. See, e.g., Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444 (1927) (pecuniary interest in outcome of judgment); Scott v.

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14. Respondents concede that Judge Marquardt used marijuana during the relevant time period. (File doc. 117 at 31.)

United States, 559 A.2d 745 (D.C. App. 1989) (appearance of impropriety). The Court declines to do so.[15]

In reviewing a claim of judicial incompetence, the appropriate inquiry is "whether the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995). Petitioner points to several parts of the record to substantiate his allegation that Judge Marquardt's ability to "perceive, comprehend, reason, and judge" was impaired. (File doc. 107 at 39–62.) Specifically, he cites to the judge's need for clarification of the facts during a pre-trial suppression hearing (see Ex. N: 5/11/82 at 37–38), alleged mistakes during voir dire (see Ex. O: 6/1/82 at 22, 32–34), reversal of an evidentiary ruling (see Ex. Q: 6/3/82 at 38–40), "misleading" advice regarding mitigation evidence (see infra Claim 5), allegedly erroneous aggravating and mitigating findings (see File doc. 107 at 46–55), and failure to find, during post-conviction proceedings, that counsel had been ineffective at trial and sentencing (see id. at 55–62). This Court carefully reviewed the entire state court record, with an emphasis on the passages referenced by Petitioner. None demonstrate that Judge Marquardt was impaired or that Petitioner was denied a fundamentally fair trial. This claim is wholly without merit and is therefore denied.

Claim 3.1: Petitioner was Entitled to a Jury Determination of the Factual Issues Constituting Aggravating Factors

Arizona Revised Statutes § 13-703(B) provides that the determination of aggravating factors shall be heard "before the court alone" without a jury. Petitioner argues that the Sixth, Eight, and Fourteenth Amendments require a jury determination of aggravating factors because such factors are essentially elements of first degree

15. Petitioner's request for funds to investigate the nature and extent of Judge Marquardt's drug usage was previously denied by the Court in its September 27, 1995 Order. (See File doc. 93.)

murder. The United States Supreme Court rejected this same argument in Walton v. Arizona, 497 U.S. 639, 647–49, 110 S. Ct. 3047, 3054–55 (1990). Claim 3.1 is denied.

Claim 3.2: Arizona's Death Penalty Statute Imposes an Improper Burden and Standard of Proof at Sentencing.

This claim lacks merit. In Walton v. Arizona, 497 U.S. 639, 649–51, 110 S. Ct. 3047, 3055–56, the United States Supreme Court rejected the petitioner's argument that the Arizona death penalty statute violates the Eighth and Fourteenth Amendments because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. Habeas relief is therefore denied.

Claim 3.3: The Aggravating Factor of Especially Heinous, Cruel, or Depraved is Unconstitutionally Broad and is Unconstitutional as Applied to Petitioner.

Petitioner argues that the Arizona Supreme Court has failed to construe the "especially heinous, cruel, or depraved" aggravating factor in a manner that adequately channels the sentencer's discretion. However, the United States Supreme Court has held otherwise. See Richmond v. Lewis, 506 U.S. 40, 50–51, 113 S. Ct. 528, 536 (1992); Walton v. Arizona 497 U.S. 639, 652–55, 110 S. Ct. 3047, 3056–58 (1990). Therefore, Petitioner's argument has no merit.

Petitioner also asserts that the especially heinous, cruel or depraved factor, A.R.S. § 13–703 (F) (6), was arbitrarily applied in his case. Whether a state court correctly applied an aggravating factor to the facts is a question of state law. Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102 (1990). Therefore, federal habeas review is limited to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. Id. The appropriate inquiry is "whether, after

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact" could have made the finding beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). A habeas court faced with a record of historical facts which supports conflicting inferences must presume (even if it does not appear in the record) that the trier of fact resolved any such conflicts in favor of the prosecution. Id. at 326, 99 S. Ct. at 2793.

In finding the (F) (6) aggravating factor in the present case, the sentencing court stated the following in its Special Verdict:

> The killing was cruel. The victim received a defensive blow to her right hand. The victim suffered pain and mental terror during and prior to this blow. She experienced mental terror while being raped by the defendant and obviously experienced mental terror after the rape and during her murder, as she tried to defend herself.
>
> The Killing was also heinous and depraved. Focusing on defendant's mental state, the evidence showed he literally crushed the victim's skull from all sides after he raped her. This was a heinous and depraved murder.

(Ex. Y, vol. 1: R.O.A. 92 at 1–2.) The Arizona Supreme Court independently reviewed the sentencing court's findings and agreed that the murder was committed in both an especially cruel and especially heinous or depraved manner. State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983).

Under Arizona law, cruelty is defined as the pain and suffering, including mental distress, of a conscious victim prior to death. State v. Amaya-Ruiz, 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990). Viewing the evidence in a light most favorable to the State, a rational fact-finder could find beyond a reasonable doubt that the victim

suffered both mental and physical pain as a result of being raped and bludgeoned by Petitioner.

Heinousness and depravity focus on the defendant's state of mind and can be satisfied by a showing that the defendant inflicted gratuitous violence on the victim beyond that necessary to kill, needlessly mutilated the victim's body, relished the murder, or senselessly killed. State v. Gretzler, 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983). Helplessness of the victim is also a factor that can be considered. Id. Viewing the evidence in a light most favorable to the State, a rational fact-finder could find beyond a reasonable doubt that the excessive number of blows to the victims's head constituted gratuitous violence and needless mutilation, that the victim was helpless, and that the killing was senseless. Petitioner is not entitled to habeas relief on Claim 3.3.

Claim 3.4: Arizona's Death Penalty Statute is Impermissibly Mandatory in Nature.

Arizona Revised Statutes § 13–703 (E) provides that the trial court "shall impose" the death penalty if one or more aggravating circumstances are found and mitigating circumstances are found insufficient to call for leniency. Petitioner claims that the statute creates a mandatory "presumption of death" and does not permit the sentencer to decide the appropriateness of the death penalty in an individual case, thus violating the Constitution. This precise claim was rejected by the United States Supreme Court in Walton v. Arizona, 497 U.S. 639, 651–52, 110 S. Ct. 3047, 3056 (1990). Habeas relief on this ground is denied.

Claim 4: Petitioner was Denied a Fair Opportunity to Present Mitigation

Petitioner asserts that counsel's ineffectiveness at sentencing constitutes an independent due process violation in that Petitioner was deprived of the opportunity to present mitigating evidence–in particular,

psychiatric testimony regarding his mental state. For the reasons discussed regarding Claim 1.3, this claim lacks merit and is denied.

Claim 5: The Trial Court Improperly Advised Petitioner Regarding the Consequences of Not Presenting Mitigation Evidence.

As already discussed in relation to Claim 1.3, Petitioner chose to not present mitigation witnesses at the aggravation/mitigation hearing. In response, the trial court stated:

> I think probably it would also be fair for me to tell you, just to make sure we understand each other, that under the statutes and under the code that I operate under in Arizona, there are a list of aggravating factors, and a list of mitigating factors that have to be determined.
>
> Those factors-certain aggravating factors have been presented to my by the State of Arizona. If I find any one of those aggravating factors to exist—if I find an absence of—or no mitigating factors—then I'm authorized to give the maximum penalty, which can be the death penalty.

(Ex. T: R.T. 7/8/82 at 10.) Petitioner argues that this was incorrect and misleading advice since A.R.S. § 13–703 (E) dictates that the trial court "shall impose" the death penalty if one or more aggravating circumstances are found and mitigating circumstances are found insufficient to call for leniency. Petitioner, however, fails to allege how these remarks amounted to a violation of federal law. See Estelle v. McGuire, 502 U.S. 62, 67–68, 112 S. Ct. 475, 480 (1991) ("[I]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Furthermore, he makes no claim that he was in fact misled or that his attorney failed to advise him of the consequences of not presenting sufficient mitigating evidence. Moreover, the trial court

emphasized the importance of presenting mitigation evidence if Petitioner hoped to avoid the death penalty. Petitioner's claim is denied.

Claim 6: The Trial Court Improperly Considered a victim Impact Statement

Claim 7: The Trial Court Improperly Considered a Presentence Report that Contained Irrelevant and Inadmissible Statements

Petitioner argues that a victim impact statement, letters from the victim's relatives and friends, and a petition with approximately 500 signatures constituted irrelevant sentencing information that violated his rights under the Eighth Amendment.[16] Petitioner also complains that that presentence report contained inadmissible speculation and hearsay. Specifically, the probation officer who prepared the presentence report included in it her opinions regarding the crime. The following is an excerpt:

> The instant offense was a senseless and brutal attack of an innocent young woman whose only mistake, if any, was being in the wrong place at the wrong time. What mentel [sic] terror and trauma the victim felt throughout her ordeal, will never be known, however, any reasonable individual can assume it was beyond comprehension. Her attempts to struggle for her life ended as the defendant viciously and repeatedly beat her head with a blunt instrument.
>
> . . . .

16. Relying on Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987), Petitioner challenges all o the victim-related evidence, including the impact of the crime on the family, opinions about the defendant, and sentencing recommendations. He acknowledges, however, that Booth's per se bar on victim impact evidence was overtured by the United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991). Nevertheless, the admission of family members' opinions and characterizations about the crime, the defendant, and the appropriate sentence remains constitutionally impermissible. Id. at 830 n.2, 111 S. Ct. at 2611 n.2.

> This writer is of the opinion the defendant represents a grave threat not only to women, but to all of society. This writer further believes that the taking of a human life is the ultimate crime and in the manner in which it occurred, the defendant should be dealt the most severe penalty possible.

(Ex. Y, vol. 1: R.O.A. 95 at 7–8.)

Absent proof to the contrary, state courts are "presumed to know the law and to apply it in making their decisions." Walton v. Arizona, 497 U.S. 639, 653, 110 S. Ct. 3047, 3057 (1990). See also Jeffers v. Lewis, 38 F.3d 411, 415 (9th Cir. 1994) ("[W]e presumed state courts follow the law, even when they fail to so indicate."); Paradis v. Arave, 20 F.3d 950, 956–57 (9th Cir. 1994) (petitioner failed to show that the trial judge relied on hearsay statements in arriving at the sentencing decision); Gerlaugh v. Lewis, 898 F. Supp. 1388, 1423-24 (D. Ariz. 1995) (same). Petitioner has failed to show that the trial court actually relied on inadmissible or irrelevant evidence when it imposed the death sentence. The court read the presentence report, but its findings do not indicate that it based the sentence on any of the information complained of by Petitioner. (See Ex. Y, vol. 1: R.O.A. 92; Ex. U: R.T. 7/12/82 at 9–2). Claims 6 are 7 are denied.

PROCEDURAL BAR

Before a federal court may review a petitioner's claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991); Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1059 (1989). A claim is "fairly presented" if the petitioner has described the operative facts and legal theories on which the claim is based. Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982);

Picard v Connor, 404 U.S. 270, 277–78, 92 S. Ct. 509, 513 (1971).[17]

If there are claims which have not been raised previously in state court, the federal court must determine whether the petitioner has state court remedies currently available to him. If there are none, he has "technically" exhausted the claims. Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n.28, 102 S. Ct. 1558, 1570 n.28 (1982)). However, the federal court may not review the claims on the merits unless the petitioner demonstrates legitimate cause and actual prejudice to excuse his failure to raise the claims in state court, or shows that a fundamental miscarriage of justice would result. Similarly, if a claim was raised in state court but found precluded or waived, the federal court will not hear the claim absent a showing of cause and prejudice or fundamental miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 338, 112 S. Ct. 2514, 2518 (1992); Coleman, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1; Engle, 456 U.S. at 129, 102 S. Ct. at 1572–73.

In the present case, Respondents argue that Claims 1.4, 3.1, 3.2, 3.3, 3.4, 4, 5, 6, and 7 are procedurally barred in federal court because the state court found them procedurally defaulted when it ruled on Petitioner's third petition for post-conviction relief.[18] (File doc. 117 at 7; Ex. UU: M.E. 6/23/88.) In Harris v. Reed, 489 U.S. 255, 263–64,

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17. Resolving whether a petitioner has fairly presented his claim to the state court, thus permitting federal review, is an intrinsically federal issue which must be determined by the federal court. Wyldes v. Hundley, 69 F.3d 247, 251 (8th cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

18. Claim 5 was initially raised as the sole issue in Petitioner's second petition for post-conviction relief. (Ex. II.) The trial court ruled that it was precluded for failure to raise it within one year of the date of mandate. (Ex. KK: M.E. 4/29/87.) The court further found that the claim lacked merit. (Id.) The court's preclusion ruling was based presumably on A.R.S. § 13–4232(A)(4), cited in the State's Response to Petition for Post-Conviction Relief. (Ex. JJ at 2.) Petitioner did not petition the Arizona Supreme Court for review. Subsequently, section (A)(4) of A.R.S. § 13–4232 was declared unconstitutional. State v. Bejarano, 158 Ariz. 253, 762 P.2d 540 (1988); State v. Fowler, 156 Ariz. 408, 752 P.2d 497 (App. 1987). Petitioner then re-raised Claim 5 in his third petition for post-conviction relief. (Ex. RR.)

n.10, 109 S. Ct. 1038, 1043–44, n.10 (1989), the United States Supreme Court held that federal courts will recognize a procedural default if the state court "clearly and expressly" states that its judgment rests upon a procedural bar, even if the state court makes an alternative ruling on the merits. See also Carriger v. Lewis, 971, F.2d 329, 333 (9th Cir. 1992) (holding claim was procedurally defaulted when state court denied claim on procedural grounds and alternatively on the merits). However, if the state court did not actually rely independently on the bar, but instead rejected Petitioner's claim on its merits or on the combined weight of Petitioner's default on the claim's merits, a federal court "implies no disrespect for the State by entertaining the claim." County Court of Ulster County, N.Y. Allen, 442 U.S. 140, 154, 99 S. Ct. 2213, 2223 (1979). See also Siripongs v. Calderon, 35 F.3d 1308, 1316–17 (9th Cir. 1994) (state court order failed to independently rely on state bar when it denied petition "both for reasons of procedural default and on the merits" and did not identify any particular procedural rule that completely barred any of the petitioner's claims).

In denying Petitioner's third petition, the state court ruled as follows:

> Defendant's Third Petition for Post-Conviction Relief is summarily denied. For the reasons stated in the State's Response and adopted by this Court, the issues raised are precluded or waived.

(Ex. UU: M.E. 6/23/88.) The State's Response, however, does not add clarity to the court's ambiguous ruling. Specifically, the State first argued that some of the claims were precluded because they had been previously adjudicated on the merits either in the first petition for post-conviction relief or on direct appeal. (Ex. SS at 3–4.)[19] It subsequently stated that "all the issues raised in the present petition" are waived "because each issue existed at the time of the appeal, but was not raised." (Id. at 5; emphasis in original.) The trial court's wholesale

19. If claims are held "precluded" because they already have been decided on the merits, there is no bar to federal habeas review.

adoption of the State's internally-inconsistent Response does not provide a clear basis for finding that the judgment rests upon procedural default grounds. See Ceja v. Stewart, 97 F.3d 1246, 1252 (9th Cir. 1996) (state court did not clearly base ruling on independent and adequate state grounds when it adopted state's mixed arguments of preclusion and waiver). Therefore, the relevant claims have been decided on the merits by this Court.

Respondents also contend that Claims 1.4, 3.1, 3.2, 3.3, 3.4, 4, 5, 6, and 7 are not "exhausted" because the Arizona Supreme Court summarily denied review of the trial court's ruling on the third petition for post-conviction relief. (File doc. 117 at 9–10; Ex. AAA.) They assert that because the trial court's procedural default rulings were left "intact," the merits of the claims have never been "fairly presented" to the state's highest court. The Court disagrees. Exhaustion does not require that the state's highest court rule on a claim's merits. Here state supreme court review is discretionary, a petitioner need only seek such review in order to exhaust state remedies. Roberts v. Arave, 847 F.2d 528, 529–30 (9th Cir. 1988). The Court further disagrees with respondents' assertion that Claim 1.4 was not raised in any sate court. (File doc. 117 at 10.) It was included in Petitioner's third petition for post-conviction relief. (See Ex. RR at 9–12.)

CONCLUSION

All of Petitioner's claims are denied on the merits. In addition, the Court finds that Petitioner is not entitled to an evidentiary hearing.

Accordingly,

IT IS ORDERED denying with prejudice Petitioner's Petition for Writ of Habeas Corpus and all amendments thereto **[file docs. 1, 23, 106]**.

IT IS FURTHER ORDERED vacating the stay of execution previously entered by the Court **[file doc. 13]**.

IT IS FURTHER ORDERED that the Clerk of the Court send copies of this Order to all counsel of record.

IT IS FURTHER ORDERED that the Clerk of the Court file Dr. Tatro's 7-page report (received from the Clerk of the Maricopa County Superior Court) as an exhibit to this case.

Dated this 31 day of October, 1997.

S/_____
Roslyn O. Silver
United States District Judge

Copies to all counsel of record

APPENDIX D

__X__ FILED ___LODGE
_____ RECEIVED ___COPY

JAN 12 1998

CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA

BY_____DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

WARREN WESLEY SUMMERLIN, PETITIONER, –vs– TERRY L. STEWART, et al., RESPONDENTS.	CIV 86–584–PHX–ROS ORDER

Pending before the Court is Petitioner's Motion for New Trial filed pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure. Petitioner requests that the Court vacate its Order of November 13, 1997, which denied Petitioner's petition for writ of habeas corpus. Respondents have filed an opposition.

Petitioner's motion is in essence a motion for reconsideration. Motions for reconsideration are appropriate only in rare circumstances. Sullivan v. Faras-RLS Group, Ltd., 795 F.Supp. 305, 308–09 (D. Ariz. 1992).

> The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

Above the Belt, Inc. v. Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983); see also Defenders of Wildlife v. Browner, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F. 2d 906, 909 (3d Cir. 1985). A motion for reconsideration should not be used to ask a court "to rethink what the court had already thought through–rightly or wrongly." Above the Belt, Inc., 99 F.R.D. at 101. Such arguments should be directed to the court of appeals. Sullivan, 795 F. Supp. at 309.

In regard to his claim that counsel Maria Regina was ineffective at the December 22, 1981 withdrawal of plea hearing due to an alleged conflict of interest which arose four days earlier, Petitioner asserts that the Court incorrectly applied the standard announced in Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). Specifically, Petitioner argues that the court performed an "actual prejudice" analysis rather than an analysis of the likely adverse effect of counsel's conflict on her performance. See United States v.

Miskinis, 966 F. 2d 1263, 1268 (9th Cir. 1992); File doc. 129 at 5–11.[1] The Court disagrees.

In an Order filed November 13, 1997, this Court stated, "Petitioner has failed to present any evidence that [the alleged conflict of interest] affected Regina's performance at the December 22 withdrawal of plea hearing." (File doc. 129 at 11.) This finding was based, in part, on Petitioner's statements at the December 15, 1981 hearing on his *pro se* motion to withdraw from plea agreement and motion for substitution of counsel, and his testimony at the state post-conviction evidentiary hearing. Specifically, Petitioner felt that Regina had "coached" him into accepting a plea agreement, and he wanted her removed from his case because she kept pushing him to accept the plea. (Ex. H: R.T. 12/15/81 at 7; Ex. W: R.T. 1/28/85 at 211.) Petitioner also indicated at the December 15, 1981 hearing that he understood withdrawal of his plea meant he would go to trial on the original charges. [2]

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1. "File doc." refers to documents in this Court's file.
2. The following exchange took place at the December 15, 1981 hearing:

> THE COURT: Do you understand that [withdrawing your plea] would involve you going to trial on the original charges in this case and the probation violation? There aren't going to be any agreements between the State and the defense on what the sentence might be, if you're convicted. Do you understand that?
>
> THE DEFENDANT: Yes, I understand that. But, see, I also understand that I am—I'm deciding to go the—what they call the medical way. I would like to go the medical way to my case, but I'm having a difficulty with counseling on the medical way.

(Ex. H: R.T. 12/15/81 at 4–5.)

Petitioner's claim in the instant motion that there "was a possibility that [Regina] could persuade him to reconsider withdrawing the plea" or that other counsel may have been able to talk Petitioner out of his desire to withdraw is simply speculation, unsupported by the record. (Motion at 5.) Regina's testimony at the post-conviction hearing established that, following the December 18, 1981 encounter with the prosecuting attorney, she believed she should withdraw from Petitioner's case *because he wanted to go to trial.* (Ex. W: R.T. 1/28/85 at 117.) No evidence was presented that Regina was likely incapable of properly advising Petitioner of the consequences of withdrawing his plea. Consequently, Petitioner failed to show that Regina's performance at the December 22 withdrawal of plea hearing was likely affected in an adverse way by the alleged conflict of interest.

The remainder of Petitioner's motion raises the same arguments and issues previously considered and decided by the Court. It does not present newly discovered evidence nor identify manifest errors of law or fact.

For the above-stated reasons,

IT IS ORDERED denying with prejudice Petitioner's Motion for New Trial **[file doc. 132]**.

DATED this 9 day of January, 1998.

ROSLYN O. SILVER
United States District Judge

Copies to all counsel of record.